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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA, *Plaintiff,*

v.

STATE OF NEBRASKA, *Defenaant.*

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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IN THE
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No. _____, Original

STATE OF SOUTH DAKOTA, *Plaintiff,*

v.

STATE OF NEBRASKA, *Defendant.*

MOTION FOR LEAVE TO FILE COMPLAINT

The State of South Dakota, by its Attorney General, requests leave of the Court to file its Complaint against the State of Nebraska submitted herewith.

WILLIAM J. JANKLOW
ATTORNEY GENERAL
State of South Dakota

STATEMENT IN SUPPORT OF MOTION

This is an action by the State of South Dakota against the State of Nebraska proposed to be instituted in this Court under authority of Article III, Section 2, Clause 1, of the Constitution of the United States, and 28 U.S.C. 1251. The purpose of the proposed action is to establish a boundary line between the States of Nebraska and South Dakota south of Rush and/or Elk Island located in the Missouri River about one mile southeast of the City of Yankton, South Dakota. The State of South Dakota contends that the entire island is within South Dakota's borders because it lies north of the main channel of the Missouri River. Act of March 2, 1861, Ch. 86, 12 Statutes at Large 239. In the alternative, the State of South Dakota contends that the boundary line between the two states lies at that point where the accretions of two former islands came into contact, forming Rush and/or Elk Island.

The earliest survey of this region was conducted in 1858, and approved by the Surveyor General's office on October 4, 1859. This survey was conducted from the Nebraska side of the Missouri River, and did not extend further than the south bank of said river. The second general survey was conducted in 1860 from the South Dakota side of said river. Approved by the Surveyor General's office on February 4, 1861, this survey did not measure land formations south of the north bank of said river.

In 1862, a survey was conducted from the Nebraska side of said river which revealed the existence of a small island a short distance from the Nebraska bank. This survey (approved by Surveyor General's office February 18, 1863) identifies said island as Island No. 1 containing 132.60 acres. Said island was described as located and being a part of Sections five (5) and six (6), Township 33, Range 1 East, Nebraska territory.

A subsequent survey triangulation was conducted in 1889 by the United States Army Corp of Engineers. This

triangulation indicates that the main channel of the Missouri River flowed to the South of Island No. 1 (Rush Island) at that early date. A larger island denominated as Elk Island is drawn as existing directly north of Island No. 1 and south of an arm or chute of the Missouri River, in a map published by order of the Corp of Engineers in 1892. Chart No. 18.

Aerial photographs of the region have been taken in the following years by the United States Department of Agriculture: 1937, 1938, 1941, 1951, 1964, 1970, 1971. The State of South Dakota contends that these photographs support the following conclusions:

a) The Island described in the Nebraska survey as Island No. 1, later became known as Rush Island;

b) The waters of the main channel of the Missouri River have flowed to the south of Rush Island from 1937 to the present;

c) A series of Islands developed in the Missouri River north of Rush Island, and north of the main channel of said river. These Islands gradually joined together and became known as Elk Island. Elk Island has always been located north of the main channel of the Missouri River;

d) At some point in time between 1951 and 1964, accretions of Rush and Elk Islands came into contact, resulting in the creation of one Island of approximately 1,000 acres;

e) Elk/Rush Island presently extends along the southern meander lines of Sections 14, 15, 16, 17, Township 93N, Range 55, Yankton County, South Dakota;

f) Elk/Rush Island is within the boundaries of the State of South Dakota.

The State of Nebraska, it is believed, may contend that the presently existing Island is the result of accretions to Rush Island (Island No. 1). That an avulsion occurred in the Missouri River at some time in the past, switching the main channel of said river from the north side of said Island to the south side. That inhabitants, possessors, owners of Rush/Elk Island have paid taxes to the County of Cedar, State of Nebraska, for a considerable period of time.

In addition, the State of South Dakota contends that several children who have resided upon Elk/Rush Island, were educated in the Yankton, South Dakota public school system during their years of residence upon said Island.

On October 22, 1974, the State of South Dakota commenced a quiet title action in South Dakota State Circuit Court for that portion of Rush/Elk Island located north of that hypothetical line representing the point where accretions between former Elk and Rush Islands came into contact. For jurisdictional reasons, that quiet title action must be held in abeyance until the boundary issue raised by this Motion and Complaint is resolved.

WHEREFORE, the State of South Dakota requests this Court to grant leave to file the Complaint submitted herewith.

Dated this day of May, 1976.

WILLIAM J. JANKLOW
ATTORNEY GENERAL
State of South Dakota

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. , Original

STATE OF SOUTH DAKOTA, *Plaintiff*,

v

STATE OF NEBRASKA, *Defendant*.

COMPLAINT

The State of South Dakota, by its Attorney General, brings this suit against the State of Nebraska, and for its claim for relief states:

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 1, of the Constitution of the United States, and 28 U.S.C. § 1251.

II

The Plaintiff claims that the following described real estate lies within the boundaries/borders of The State of South Dakota;

a. The real estate which is the subject of this action involves an island located in the Missouri River and commonly referred to as Elk and Rush Islands. In general terms, Elk and Rush Islands and the

accretions thereto, can be described as beginning approximately 1/8 of a mile east of the southeast corner of Outlet Lot 97 in Section 18 in the City of Yankton, South Dakota, and continuing east for approximately (2.8) two point eight miles. This island extends along the Missouri River bank close to and south of the meander lines of Sections 14, 15, 16, 17, Township 93N, Range 55, Yankton County, South Dakota.

The northern boundary of Elk Island is a small branch channel of the Missouri River known as the "North Arm," "Upper Arm" or "Chute" of the Missouri River. This arm of the Missouri River is presently in part or totally blocked by the Yankton city dump.

Elk Island is north of Rush Island. Both islands have always been north of Sections 7, 8 and 9 in Township 33, Range 1 East, Cedar County, Nebraska. Accretions have formed to both islands. A former channel of water separating the two islands is now dry, and the accretions to both islands have met. This line has never been the subject of a survey.

The extreme eastern and western points of Elk and Rush Islands are bounded by the Missouri River and the South Dakota bank (not boundary) of the Missouri River.

Elk Island and Rush Island are now joined together by the accretions and the dry channel. Elk Island and Rush Island and the accretion to the respective islands now totals approximately 1,000 acres.

Elk and Rush Islands are located north of the main channel of the Missour River.

III

The Defendant State of Nebraska contends the above described real estate lies within the boundaries/borders of the State of Nebraska.

IV

That the contentions of the Defendant are erroneous, and have no basis in law or fact. That the Plaintiff's claim is based upon the correct law and facts.

V

That the Defendant's claims have caused and will continue to cause injury to the Plaintiff for these reasons:

a) The Plaintiff has instituted in one of its Circuit Courts, an action to quiet title to a considerable portion of the above described real estate. If the contentions of the Defendant are meritorious, the jurisdiction of this Circuit Court to decide the issues raised by the quiet title action, would be ousted. Accordingly, the Defendant's contentions are causing delay and uncertainty in these proceedings.

b) The Defendant has collected real estate taxes levied against the above described real estate for a considerable number of years. They intend to continue such practice in the foreseeable future. This action of the Defendant has resulted in a considerable loss of revenue for the Plaintiff.

c) The Defendant's claim has caused confusion among various state and local agencies and subdivisions, as to whether said real estate is within Nebraska or South Dakota for administrative purposes.

WHEREFORE, Plaintiff prays:

1. That a decree be entered by this court declaring that the above described real estate is located within the boundaries/borders of the State of South Dakota.

2. That this Court enjoin the Defendant from ever asserting any right, title, or interest in or to said real estate or any part therefore.

3. That the Court enjoin the Defendant from ever levying or collecting real estate taxes upon the above described real estate.

4. That the Plaintiff recover with interest, the revenue collected by the Defendant in the past years in the form of real estate taxes.

5. That the Plaintiff recover its costs and disbursements.

6. For such other relief as this Court may deen equitable under the circumstances.

Dated this_____ day of May, 1976.

WILLIAM J. JANKLOW
ATTORNEY GENERAL
State of South Dakota

CERTIFICATE OF SERVICE

Service of a Motion for Leave to File a Complaint, and Complaint, was made this day of May, 1976, by despositing the same in a United States mailbox, with airmail postage prepaid, addressed to the following individuals:

Paul Douglas ATTORNEY GENERAL State Capitol Lincoln, Nebraska	J. James Exon GOVERNOR State Capitol Lincoln, Nebraska

In addition, I hereby certify that all parties required to be served have been served.

Dated this day of May, 1976.

WILLIAM J. JANKLOW
ATTORNEY GENERAL
State of South Dakota

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STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR DEFENDANT IN OPPOSITION AND APPENDIX

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INDEX

Pages

Jurisdiction 1

Questions Presented 2

Statement 2

Argument:

I. South Dakota's motion for leave to file a complaint should be denied because the same issues are raised in a pending state court action which provides an appropriate forum. 5

II. South Dakota's motion for leave to file a complaint should be denied as a result of its long acquiescence in the exercise of sovereignty over the island by the State of Nebraska. 9

Conclusion 20

CITATIONS

Cases:

Arizona v. New Mexico, — U. S. —, 48 L. Ed. 2d 376 (1976) 5, 6, 7, 8

Arkansas v. Tennessee, 310 U. S. 563 (1940) 10, 11, 12

Colorado River Water Conservation District v. United States, — U. S. —, 47 L. Ed. 2d 483 (1976) 8

Durfee v. Duke, 375 U. S. 106 (1963) 7

Illinois v. City of Milwaukee, 406 U. S. 91 (1972) 5

Indiana v. Kentucky, 136 U. S. 479 (1890) 13

CITATIONS—Continued

Pages

Louisiana v. Mississippi, 202 U. S. 1 (1906) 15

Maryland v. West Virginia, 217 U. S. 1 (1910) 15, 19

Massachusetts v. Missouri, 308 U. S. 1 (1939) 6, 7, 8

Michigan v. Wisconsin, 270 U. S. 295 (1926) 10, 15

Missouri v. Iowa, 48 U. S. (7 How.) 660 (1849) 11

New Mexico v. Colorado, 267 U. S. 30 (1925) 11

Ohio v. Kentucky, 410 U. S. 641 (1973) 10, 17, 18

Rhode Island v. Massachusetts, 45 U. S. (4 How.) 591 (1846) 9, 11

Vermont v. New Hampshire, 289 U. S. 593 (1933) 15

Virginia v. Tennessee, 148 U. S. 503 (1893) 15, 18

STATUTES:

28 U. S. C. § 1251 1

28 U. S. C. § 1257(2) 6

28 U. S. C. § 1257(3) 7

CONSTITUTIONS:

Constitution of the United States, Article III, Section 2, Clause 1 1

IN THE

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October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR DEFENDANT IN OPPOSITION AND APPENDIX

JURISDICTION

The original jurisdiction of this Court has been invoked, pursuant to Article III, Section 2, Clause 1, of the Constitution of the United States, and 28 U. S. C. § 1251.

QUESTIONS PRESENTED

1. Whether this Court should exercise its original jurisdiction in an action brought by a state when an action is pending involving the same issues brought by that state in its own courts.

2. Whether this Court should exercise its original jurisdiction in a boundary dispute brought by one state against another where the complaining state has long acquiesced in the exercise of acts of sovereignty by the other over the disputed territory.

———o———

STATEMENT

This action involves a claim of the State of South Dakota to title to a certain island located in the Missouri River, which forms the boundary between the States of Nebraska and South Dakota. Title to this island has historically been recorded in the State of Nebraska. The earliest title record is an 1865 patent deed, effective as of 1864, which was issued by the United States to one Helen Auge and which is recorded in Cedar County, Nebraska. Title and nontitle transactions affecting the island have been recorded in Nebraska ever since that date (App. 36).

South Dakota refers to the existence of several maps, surveys and aerial photographs in its Statement. There are many additional maps, surveys and aerial photographs as well. These documents identify the territory in question as either Island No. 1, Rush Island or Elk Island. All of these maps, surveys and aerial photographs together

show that the Missouri River changed its course numerous times until the middle 1950's when the Gavins Point Dam was constructed several miles upstream by the United States Army Corps of Engineers. Prior to this construction project, the course of the river changed frequently and consequently the main channel of the river also changed. The main channel of the Missouri River ran north of the island during its early history, but after the dam's construction it stabilized south of the disputed island. Since then the island has been located north of the main channel of the Missouri River. The chute of the Missouri River which runs north of the island is presently in part or totally blocked by the Yankton, South Dakota, city dump and there is land access from South Dakota. The island is presently approximately 1000 acres in size and is being farmed by the Nebraska titleholders.

Cedar County, Nebraska, has assessed the island for property tax beginning in the year 1864 through the present except for a period of five years during the 1930's (App. 38 and 40). The island has not been assessed in Yankton County, South Dakota, during at least the last thirty years (App. 41). In 1965, the Director of Equalization of Yankton County, South Dakota, consulted the Attorney General of the State of South Dakota and was advised by an Assistant Attorney General that the tax situs for the land in question was in Nebraska (App. 42).

Children of Charles Broz who resided on the island attended school in Yankton, South Dakota, from 1961 until 1965. In 1965, Mr. Broz was notified by Yankton County, South Dakota officials that he could no longer send his children to Yankton schools unless he paid tuition because

the island was located in Cedar County, Nebraska (App. 45).

The Cedar County, Nebraska, sheriff has on several occasions exercised his jurisdiction upon the island (App. 46 and 48).

In 1958 a petition to quiet title over the island which is now in dispute was filed in the District Court of Cedar County, Nebraska. On November 7, 1958, that court quieted title of the island in predecessors of the present Nebraska titleholders (App. 23). On January 25, 1971, the Circuit Court of the First Judicial Circuit of South Dakota held in a quiet title action filed against the Nebraska titleholders that the chute north of the subject island was the south boundary of Yankton County and the State of South Dakota, and expressly recognized and adopted the earlier decision of the District Court of Cedar County, Nebraska, in 1958 (App. 29). On October 24, 1974, the State of South Dakota, by the Commissioner of School and Public Lands, brought a quiet title action against the Nebraska titleholders, among others, asking that the State of South Dakota be declared the owner in fee simple of the northern portion of the island in question. The defendant Nebraska titleholders moved to dismiss on the grounds that the South Dakota court lacked jurisdiction because the land in question was located in the State of Nebraska. The South Dakota court has not ruled upon this motion. On approximately May 10, 1976, the State of South Dakota filed this Motion for Leave to File Complaint and Complaint. Thereafter, on May 17, 1976, the South Dakota Circuit Court ordered that further proceedings in that case should be stayed until a final determination is made by

this Court as to the location of the exact boundary between Yankton County, South Dakota and Cedar County, Nebraska (App. 33).

ARGUMENT

I.

South Dakota's Motion for Leave to File a Complaint should be denied because the same issues are raised in a pending state court action which provides an appropriate forum.

On October 24, 1974, the State of South Dakota filed an action in the Circuit Court, First Judicial Circuit, County of Yankton, South Dakota, seeking to quiet title in itself to the real estate which is the subject of this action. By an order dated May 17, 1976, and entered June 1, 1976, the South Dakota court stayed the proceedings before it pending a determination of the United States Supreme Court of the exact boundary between South Dakota and Nebraska (App. 33). On approximately May 10, 1976, the State of South Dakota filed its Motion for Leave to File a Complaint in this Court.

This Court should decline to exercise jurisdiction over the case thrust upon it by the South Dakota lower court. This Court has consistently held and has this year reaffirmed that its "original jurisdiction should be invoked sparingly." *Arizona v. New Mexico*, — U. S. —, 48 L. Ed. 2d 376, 379 (1976); *Illinois v. City of Milwaukee*, 406 U. S.

91, 93-94 (1972). In *Arizona v. New Mexico, supra,* this Court in a *per curiam* opinion stated that its original jurisdiction is obligatory only in "appropriate cases." A determination of whether a case is "appropriate" was there said to depend upon two factors: (1) "the seriousness and dignity of the claim;" and (2) "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Arizona v. New Mexico, supra,* 48 L. Ed. 2d at 379. The Court also noted that it must also inquire whether recourse to its jurisdiction is necessary for the state's protection. *Id.* 48 L. Ed. 2d at 379-380, citing *Massachusetts v. Missouri,* 308 U. S. 1, 18-19 (1939).

In *Arizona v. New Mexico,* Arizona sought to have this Court determine the constitutionality of New Mexico's electrical energy tax as imposed on Arizona utilities generating power in New Mexico and retailing it in Arizona. A group of Arizona utilities had brought an action in the New Mexico courts raising the same issues. The Court held that the pending state action provided an appropriate forum for litigation of the issues, even though Arizona was not a party. "If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U. S. C. § 1257(2) [28 U. S. C. S. § 1257(2)]." *Id.,* 48 L. Ed. 2d at 380.

In the present case, an action to quiet title to land has been brought by the State of South Dakota in its own

courts. There is a difficult conceptual question in a case where a state court's jurisdiction is based upon the situs of real property within the state, as is true in a quiet title action, and where there is a question whether the land is in fact located in that state. Nevertheless, it is clear that the state court does have power to determine whether it has subject matter jurisdiction in such a case. *See, e. g., Durfee v. Duke,* 375 U. S. 106 (1963) (State of Missouri must gave full faith and credit to a decision of the Supreme Court of Nebraska holding that disputed boundary land is in Nebraska). The order of the South Dakota court (App. 33) shows that no question has been raised concerning the *in personam* jurisdiction of the South Dakota court in the quiet title action.

In *Durfee v. Duke, supra,* this Court indicated that a quiet title action between private parties would not bind the states involved by a decision that land was located in one state or another. *Id.,* 375 U. S. at 115. In the present case, however, the State of South Dakota is a party before its own court. It would therefore be bound by a decision adverse to its claim that the disputed land is in South Dakota. A decision favorable to South Dakota would be reviewable by this Court upon writ of certiorari under 28 U. S. C. § 1257 (3) because the boundary between the states is set by statute of the United States. Thus, this case does not differ from *Arizona v. New Mexico, supra.* The State of South Dakota should of course be able to rely upon its own courts to protect its interest, thus meeting the criterion of *Massachusetts v. Missouri, supra.*

Moreover, in light of the other concerns for this court's calendar expressed in *Arizona v. New Mexico,* it is

submitted that the possibility of a decision favorable to South Dakota is so slight that, even though the State of Nebraska is not a party there, this Court should give the courts of South Dakota an opportunity to hear the case before it undertakes to hear the matter under its original jurisdiction. In *Arizona v. New Mexico, supra,* this Court noted its concern with "the seriousness and dignity of the claim" and its inclination to "a sparing use of our original jurisdiction." These concerns are in essence the same as those expressed by this Court in cases where refusal to exercise the jurisdiction of federal courts has been upheld where contemporaneous state jurisdiction exists. These cases involve abstention out of consideration "for reasons of wise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation District v. United States,* — U. S. —, 47 L. Ed. 2d 483, 498 (1976).

> "[I]n certain cases . . . the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. [Citations omitted.] Grounds for justifying such a qualification have been found in 'considerations of convenience, sufficiency, and justice' applicable to particular classes of cases." *Massachusetts v. Missouri, supra,* 308 U. S. at 19.

Here we have a case in which the lower courts of both Nebraska and South Dakota have previously entertained quiet title suits concerning this very property. The Nebraska Court by an order dated November 7, 1958, and recorded December 2, 1958 (App. 23), ruled that the property is in Nebraska and quieted title thereto. The South

Dakota court, in an order dated January 25, 1971, and entered May 6, 1971 (App. 29), referred to the earlier Nebraska decree[1] and, apparently in reliance thereon, refused to quiet title in the plaintiff. Thus, the courts of both states have previously decided that the property in question is located within the State of Nebraska.

In view of this history of litigation, the claim of the State of South Dakota cannot be said to have the "seriousness and dignity" which require this Court to exercise its original jurisdiction at this time, and its Motion For Leave to File Complaint should be denied.

II.

South Dakota's Motion for Leave to File a Complaint should be denied as a result of its long acquiescence in the exercise of sovereignty over the island by the State of Nebraska.

In international law it has been the constant and approved practice of nations that uninterrupted possession of territory over a length of time by one nation excludes the claim of every other in order that the rights of nations not remain uncertain, subject to dispute, and ever ready to occasion bloody wars. This Court in the landmark case of *Rhode Island v. Massachusetts,* 45 U. S. (4 How.) 591 (1846), adopted and applied that principle to a dispute between two states concerning the location of their common boundary. The Court, speaking of the long and uninterrupted possession of Massachusetts and the

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1. The South Dakota court mistakenly gave the date of the earlier decree as December 7, 1958.

delays of Rhode Island in alleging any mistake in the boundary, said:

> ". . . Surely this connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary." Id. at 639.

This doctrine, known as prescription and acquiescence, has continually been applied to boundary disputes between states since its adoption in 1846. The doctrine most recently was applied in *Ohio v. Kentucky*, 410 U. S. 641 (1973), wherein this Court recognized the soundness and solidity of the doctrine by quoting the following from *Michigan v. Wisconsin*, 270 U. S. 295, 308 (1926), with approval:

> ". . . 'The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority.' . . ." 410 U. S. at 651.

This Court has held that the doctrine of prescription and acquiescence overrides all other doctrines in state boundary disputes. See *Arkansas v. Tennessee, infra.* It has even been held that the doctrine applies even though

the boundary line is based upon mutual mistake by the parties. In *Rhode Island v. Massachusetts, supra,* this Court stated:

> "... More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin." 45 U. S. (4 How.) at 638.

This Court has also held that states are bound by a practical boundary line that has been established by their actions even though the line is not otherwise precisely accurate. *Missouri v. Iowa,* 48 U. S. (7 How.) 660 (1849); and *New Mexico v. Colorado,* 267 U. S. 30 (1925). In the case of *Arkansas v. Tennessee,* 310 U. S. 563 (1940), this Court held that the rule of *thalweg* and the doctrine as to the effect of an avulsion, "may become inapplicable when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area." Id. at 571.

It is therefore clear that regardless of where a boundary line would otherwise be located, the actual boundary will be held to be that indicated by the doctrine of prescription and acquiescence, where the conditions necessary to its application have been met.

It is clear from all the cases in which the doctrine of prescription and acquiescence has been considered that there must be two basic conditions present before it will be applied: (1) there must be a continuous and undisput-

ed exercise of sovereignty over a long period of years by one state (prescription), and (2) there must be implied consent by the second state to the exercise of sovereignty by the first state (acquiescence). This Court has considered various factors in order to determine whether these conditions have been fulfilled.

In *Arkansas v. Tennessee, supra,* the State of Arkansas was challenging the jurisdiction over, and the right to possession of, an island which was caused to be moved to the east of the main channel of the Mississippi River by an avulsion of the river in 1821. After the avulsion the land in dispute was, and continued to be for many years, attached to the State of Tennessee. This Court held that the territory in question was within the boundaries of Tennessee by virtue of the acquiescence on the part of Arkansas in the exercise by Tennesse of dominion and jurisdiction over that area. The Court looked to the following acts on the part of Tennessee to establish prescription: inhabitants on the island voted in Tennessee; land transactions and transfers were made under the authority of Tennessee since 1823; inhabitants on the island were taxed in Tennessee at least as far back as 1870; inhabitants on the island were educated in Tennessee; and there was a tax sale by a Tennessee sheriff in 1848. In finding that Arkansas had acquiesced in Tennessee's exercise of sovereignty, the Court relied upon the fact that there had been no showing that Arkansas had ever asserted any claim to the land in controversy prior to the institution of the lawsuit, even though Arkansas had notice of Tennessee's claim to this land almost sixty years prior to the lawsuit.

In *Indiana v. Kentucky*, 136 U. S. 479 (1890), the State of Indiana was contesting Kentucky's right to the jurisdiction over a tract of land known as Green River Island. The Court had previously held, and the states recognized, that Kentucky had jurisdiction to the north bank of the Ohio River. Indiana claimed, however, that Green River Island was on the northern bank of the River and was not, in fact, an island at the critical point in time at which Kentucky became a state and her boundaries were established. Kentucky claimed conversely that a chute of the Ohio River ran north of Green River Island and therefore this island was within its jurisdiction, being south of the north bank of the River. The Court said:

> "But above all the evidence of former transactions, and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty, both as to soil and jurisdiction, over the land. On that day, and for many years afterwards, as justly and forcibly observed

by counsel, there were perhaps scores of living witnesses whose testimony would have settled to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge, and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues." Id. at 509-510.

The Court further stated concerning prescription by Kentucky:

> "Whilst on the part of Indiana there was a want of affirmative action in the assertion of her present claim, and a general acquiescence in the claim of Kentucky, there was affirmative action on the part of Kentucky in the assertion of her rights, as we have seen by the Law declaring the boundaries of her counties on the Ohio River, passed in January, 1810; and there was action taken in the courts of the United States and of the State by parties claiming under her or her grantor, and there was also action by her officers in the assertion of her authority over the land; all of which tends to support the claim of rightful jurisdiction. It at least shows that her claim was never abandoned by her or her people. . . ." Id. at 515.

In addition, the Court stressed the fact that there were two prior adjudications involving private parties, one by a United States Circuit Court and the other by a Circuit Court of the State of Kentucky, holding that the island in dispute was within the jurisdiction of Kentucky. The

Court also took into consideration the fact that numerous grants of titles of land were made by Kentucky and that for half a century the island in question had been assessed for taxes by officers of the State of Kentucky. The Court after considering all these factors concluded as follows:

> ". . . The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it. Id. at 518.

Other cases in which this Court has applied the doctrine of prescription and acquiescence are *Louisiana v. Mississippi,* 202 U. S. 1 (1906); *Virginia v. Tennessee,* 148 U. S. 503 (1893); *Michigan v. Wisconsin,* 270 U. S. 295 (1926); *Maryland v. West Virginia,* 217 U. S. 1 (1910); and *Vermont v. New Hampshire,* 289 U. S. 593 (1933).

Considering all of these cases, it is clear that several factors are especially important in considering whether the doctrine of prescription and acquiescence should be applied. Some of these factors which have been referred to repeatedly in the reported cases are: (1) What state has exercised the taxing authority? (2) In which state does the chain of title exist? (3) In which state have the residents voted? (4) Which state has provided educational services to the residents? (5) Which state provides police protection to the area? (6) What is shown to be the boundary on maps and surveys made of the area? All of these factors are indications of what the litigants and the

people living in the area consider to be the boundary between the two states.

The affidavits which have been submitted in support of this brief clearly show that the people residing in the area on either side of the border, and both the State of South Dakota and the State of Nebraska as well, have always considered the island to be within the jurisdiction of the State of Nebraska. It is the State of Nebraska which has assessed the island for taxation for more than one hundred years (App. 38 and 40), as admitted in plaintiff's Motion for Leave to File Complaint and Complaint (p.7). The State of South Dakota has not done so (App. 41). In fact, it appears that when the Attorney General for the State of South Dakota was specifically asked where the tax situs of the island was to be located in 1965, it was his opinion that "the tax situs for the land in question is still in Nebraska" (App. 43). A complete chain of title exists in the State of Nebraska, dating back to an original deed from the United States in 1865 through the present owners (App. 36). Although the State of South Dakota has indicated in its motion that it has provided educational services, the affidavit of Charles E. Broz (App. 45) states that in 1965 he was required to either withdraw his children from the South Dakota school system or pay tuition because he was living within the State of Nebraska. Such appears to be more than mere acquiescence by the State of South Dakota and may even be considered to be a positive assertion by the state that the island in question is within the jurisdiction of the State of Nebraska. The Sheriff of Cedar County, Nebraska, has exercised jurisdiction over the island on behalf of the State of Nebraska by offering police protection and by

serving process (App. 46) as well as by auctioning the property and issuing a sheriff's deed (App. 48). The affidavit of the former Sheriff of Yankton County, South Dakota, indicates that such police protection and civil services were not provided by the State of South Dakota, at least during his term of office (App. 49). And finally, and perhaps most importantly, we find that a district court of the State of Nebraska has exercised jurisdiction over the island in a quiet title action (App. 23), and conversely, a South Dakota circuit court in 1971 expressly found that the island in question was within the jurisdiction of the State of Nebraska (App. 29). All of this clearly indicates that there has never really been a dispute concerning the jurisdiction over the island in question until the State of South Dakota attempted to claim the island by filing a quiet title action in its own circuit court in 1974, the same court which had earlier found the same island to be within the jurisdiction of the State of Nebraska. All the conditions are present for the application of the doctrine of prescription and acquiescence. Therefore, the State of Nebraska contends it should be applied.

It may appear at first blush that the procedure of asking this Court to summarily rule upon the merits of the complaint in denying plaintiff's motion is inappropriate at this point. However, this Court's original jurisdiction has only been sparingly exercised and should not be exercised in a case which is so clearly nonmeritorious as to be appropriate for summary dismissal. To allow this case to go further would only serve "to delay an adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky, supra* at 644. This reasoning and the resulting departure from common rules

of civil procedure was specifically recognized and approved by this Court in *Ohio v. Kentucky, supra.* Therein the Court stated:

> "Accepted procedures for an ordinary case in this posture would probably lead us to conclude that the motion for leave to file should be granted, and the case would then proceed to trial or judgment on the pleadings. This, however, is not an ordinary case. It is one within the original and exclusive jurisdiction of the Court. Const Art III, § 2; 28 USC § 1251 (a), [28 USCS § 1251 (a)]. Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure. See United States Supreme Court Rule 9; Rhode Island v. Massachusetts, 14 Pet 210, 10 L Ed 423 (1840). Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. See, for example, Alabama v. Texas, 347 U S 272, 98 L Ed 689, 74 S Ct 481 (1954); California v. Washington, 358 U S 64, 3 L Ed 2d 106, 79 S. Ct 116 (1958); Virginia v. West Virgina, 234 U S 117, 121, 58 L Ed 1243, 34 S Ct 889 (1914). Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." Id. at 644.

Even though this case involves only the jurisdictional boundary between two states and would not on its face determine private property rights, this Court has held that equity and justice demand that the effect on private property rights of individual citizens should be considered, and this in fact is an underlying rationale for the doctrine of prescription and acquiescence. In *Virgina v. Tennessee, supra,* the Court said:

> "There are also moral considerations which should prevent any disturbance of long recognized boundary lines; consideration springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home, and to family, on which is based all that is dearest and most valuable in life." Id. at 524.

This Court further stated in *Maryland v. West Virginia, supra,* as follows:

> "Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. . . ." Id. at 46.

If the Court were to determine that the island is within the jurisdiction of the State of South Dakota, it would in effect be destroying private property rights based upon a chain of title in the State of Nebraska dating back in excess of one hundred years. The Attorney General of the State of South Dakota has contended in the quiet title action filed in its circuit court that title to the land is in the State of South Dakota, not in the persons holding title through Nebraska. To allow the State of South Dakota to claim title after nearly one hundred years of silence is clearly contrary to the reasonable expectations of the private property owners who have justifiably relied upon the chain of title found in Nebraska.

CONCLUSION

The State of South Dakota has already brought an action in its own courts seeking to obtain title to the island in question. Prior decisions of the courts of both South Dakota and Nebraska have determined that the island is within the boundaries of the State of Nebraska. The State of South Dakota now seeks to invoke the original jurisdiction of this Court even while it is a party to an action in its own courts involving the same issue. The time of this Court and the resources of the State of Nebraska as a defendant should not be committed to this action until there is some indication that the courts of South Dakota will not follow settled law concerning the situs of this property. If the courts of South Dakota do determine that the island is within South Dakota, that determination can be reviewed by this Court under a writ of certiorari, or an action could then be brought under the original jurisdiction of this Court.

If this Court decides that the present dispute should not be first considered by the courts of South Dakota, the Motion for Leave to File a Complaint should nonetheless be denied because for more than a century South Dakota has acquiesced in the exercise of sovereignty over the island by the State of Nebraska.

Respectfully submitted,

STATE OF NEBRASKA, Defendant,

By PAUL L. DOUGLAS

Attorney General of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68508
Tel. (402) 471-2682

Attorney for Defendant.

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1975

—o—

1975 No. 72, Original

—o—

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

—o—

ON MOTION FOR LEAVE TO FILE COMPLAINT

—o—

INDEX

Page

In the District Court of Cedar County, Nebraska—Judgment Decree—Gill, et al. v. Heirs of Henry S. Yager 23

In Circuit Court First Judicial Circuit, State of South Dakota—Judgment—Schlaefli v. Foley, et al. 29

INDEX — Continued

Page

In Circuit Court First Judicial Circuit, State of South Dakota—Order—State of South Dakota, et al. v. Foley, et al. 33

Affidavit of Edward S. Stevens 36

Affidavit of Roger Schwartz 38

Affidavit of James Potter 40

Affidavit of Martin A. J. Slemp 41

Affidavit of Martin Slemp 42

Affidavit of Charles E. Broz 45

Affidavit of John F. Riibe 46

Affidavit of Rita J. Stevens 48

Affidavit of Ed Sampson 49

—o—

IN THE
DISTRICT COURT OF CEDAR COUNTY, NEBRASKA

Clyde Gill, Otto Isaak, Wm. Schmoll, and Charles E. Broz,

Plaintiffs.

vs.

The heirs, devisees, legatees, personal representatives, and all other persons interested in the estate of Henry S. Yager, deceased, real names unknown, and all persons having or claiming any interest, right, title, or claim to Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's Record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees

east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 east in Cedar County, Nebraska, real names unknown.

Defendants.

———o———

JUDGMENT DECREE

Now on this 7th day of November, 1958, the same being one of the judicial days of the District Court of Cedar County, Nebraska, this cause came on for hearing to the Court.

The Court finds that all of the defendants and each of them were duly served with process in accordance with law, and that each of them has failed to appear, plead or answer, with the exception of the unknown defendants who might be in military service of the United States, who have through their duly authorized attorney, appointed by the Court, answered and filed a general denial to the allegations of plaintiffs' petition.

The Court finds that it has jurisdiction of the subject matter in said cause of action and of all of the defendants made parties to this suit.

The Court finds that the plaintiffs have filed a military affidavit in this cause, and the Court has appointed an attorney to represent such defendants who might be in the military service who have filed an answer herein as hereinabove stated. That all defendants failing to appear, plead or answer are hereby severally found and adjudged in default.

The Court finds that Clyde Gill, one of the plaintiffs in this action, died intestate on the 17th day of September, 1958, and that Ruth M. Gill is his surviving wife, Bonnie Gill Autro his daughter, and Clyde Gill, Jr., his son, are the sole and only heirs at law of said Clyde Gill, deceased, and are the only persons interested as such heirs in the real estate herein described.

That the Court upon application of the other plaintiffs, has entered an order of revivor of said action, reviving said action in the names of Ruth M. Gill, Bonnie Gill Autro and Clyde Gill, Jr. as parties plaintiff in this action in addition to the original plaintiffs, Otto Izaak, Wm. Schmoll and Charles E. Broz.

The Court finds that the original plaintiffs in this action were each the owners of an undivided one-fourth interest in the land involved in these proceedings and that the substituted parties Ruth M. Gill, Bonnie Gill Autro and Clyde Gill, Jr. have become the owners of the share of the said Clyde Gill, deceased.

On consideration of the evidence adduced herein the Court finds generally in favor of the plaintiffs as substituted herein, and that the allegations of their petition are true; that the plaintiffs are the owners in fee simple of the following described real estate, to-wit:

> Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's Record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1, East, Cedar County, Nebraska, as is located by the survey

recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska.

The Court further finds that the plaintiffs and their predecessors in title have been in the open, notorious, exclusive, continuous and adverse possession of said real estate for more than ten years immediately prior to the commencement of this action, and during all of said time asserted title to said premises against all persons whomsoever.

It is therefore considered by the Court that the title of the plaintiffs' to said real estate be and the same is hereby quieted and confirmed in the substituted plaintiffs as

each of their interests appear and as hereinabove found as against each of said defendants, and against all persons having or claiming any interest in said real estate, real names unknown, and each and all of them are hereby enjoined forever from asserting any claim or interest in said real estate, or any part thereof, including the unknown children, heirs, devisees, legatees, legal representatives and all other persons interested in the estate of Henry S. Yager, deceased, real names unknown.

The costs of this action are hereby taxed against the plaintiffs herein.

BY THE COURT:

/s/ John E. Newton
Judge

(SEAL)—/s/ Shirley Arens, July 19, 1976

State of Nebraska, County of Cedar, ss.

I, Shirley Arens, the duly elected, qualified and acting Clerk of the District Court of the Eighth Judicial District of the County of Cedar, State of Nebraska, which is a court of record, having a seal, hereby certify that: By law I have the custody of the seal and all records, books, documents, and papers of or pertaining to the court;

The Judgment Decree hereto annexed is a true copy of papers appertaining to the court and on file and of record in the office of the clerk of the court;

I have compared the foregoing copy with the original on file in the office of the clerk of the court; and the same comprises a full, true, and correct transcript therefrom and the whole thereof.

Witness my hand and the seal of the court on 19th day of July, 1976.

/s/ Shirley Arens
Clerk of the District Court

(SEAL)

State of Nebraska, County of Cedar, ss.

I, Shirley Arens, Clerk of the District Court in and for Cedar County, Nebraska, the same being a Court of record, do hereby certify that the Honorable John E. Newton, whose genuine signature appearing on the foregoing Judgment Decree, was at the time of signing same, a Judge of the District Court of Cedar County, in the Eighth Judicial District of the State of Nebraska, duly qualified and acting, and that all his official acts as such are entitled to full faith and credit.

Witness my hand and official seal at the City of Hartington, in Cedar County, State of Nebraska, this 19th day of July, 1976.

/s/ Shirley Arens
Clerk of the District Court

(SEAL)

State of South Dakota, County of Yankton, ss.

In Circuit Court First Judicial Circuit

ROBERT SCHLAEFLI,

Plaintiff,

vs.

DR. R. J. Foley and DR. OTTO ISAAK,

Defendants.

JUDGMENT

The above entitled action having come on before the court on the 5th day of June, 1970, for trial to the court in the courtroom of the Circuit Court in the courthouse in the City and County of Yankton, South Dakota, and the plaintiff appearing by his attorney James W. Donahoe, of Vermillion, South Dakota, and the defendants appearing by their attorney Everett A. Bogue, of Vermillion, South Dakota, and the court having heard the evidence and having heretofore and on January 14, 1971, rendered a memorandum decision and the court having pursuant to Rule 52 of the South Dakota Rules of Civil Procedure made and entered its findings of fact and conclusions of law which are now on file herein, it is

ORDERED, ADJUDGED AND DECREED as follows:

(a) That the plaintiff is the owner and entitled to the possession of Lots 2, 3 and 4 of Section 15, Township 93, Range 53 in Yankton County, South Dakota, together with accretions thereto extending from the south boundary

thereof to the chute or arm of the Missouri River along the south side of such accretions which said chute or arm of the Missouri River the court adjudges to be the south boundary of Yankton County, and the State of South Dakota.

(b) That the defendants are the owners and entitled to possession of that tract of land bounded on the south by the main channel of the Missouri River and on the north by the chute or arm of the Missouri River which forms the south boundary of the premises owned by the plaintiff, and which is more particularly described in a judgment of the District Court of Cedar County, Nebraska, dated December 7, 1958, in which Clyde Gill et al are plaintiffs and the heirs of Henry S. Yaeger are defendants as

> Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original government survey and which is more fully and particularly described in the Surveyor's Record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, Page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "a" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72

degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 dgrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, together with all accretions thereto.

(c) That the plaintiff has no right, title or interest, estate, claim, lien or encumbrance upon the premises included in said island and that plaintiff is forever barred and enjoined from asserting any right, title, interest, estate, claim, lien or encumbrance upon the premises above described or any part thereof adverse to the defendants.

(d) That the defendants have and recover their costs and disbursements herein to be hereinafter taxed by the clerk of this court in the amount of $156.61.

Dated at Yankton, South Dakota, this 25th day of January, 1971.

BY THE COURT:

/s/ C. C. Puckett

Judge

ATTEST:

/s/ Leo Klimisch

Clerk

(SEAL)

State of South Dakota, Yankton County, ss. I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office. 7-19, 1976 /s/ Heather Kuchta, Clerk of Courts, Yankton County. By dp Eleanor Gregg.

Filed May 6, 1971. Leo Klimisch, Clerk of Courts.

Judg. 14, pg. 549-550.

State of South Dakota, County of Yankton, ss.

I, Heather Kuchta, Clerk of the Circuit Court in and for Yankton County, South Dakota, the same being a Court of record, do hereby certify that the Honorable C. C. Puckett, whose genuine signature appearing on the foregoing Judgment Decree, was at the time of signing the same, a Judge of the Circuit Court of Yankton County, in the First Judicial Circuit of the State of South Dakota, duly qualified and acting, and that all his official acts as such are entitled to full faith and credit.

Witness my hand and official seal at the City of Yankton, in Yankton County, State of South Dakota, this 27th day of July, 1976.

/s/ Heather Kuchta

Clerk of the Circuit Court

(SEAL)

In Circuit Court First Judicial Circuit

74-153

State of South Dakota, County of Yankton, ss.

STATE OF SOUTH DAKOTA, BY THE COMMISSIONER OF SCHOOL AND PUBLIC LANDS,

Plaintiff,

vs.

DR. ROBERT J. FOLEY, et al.,

Defendants.

ORDER

The defendants, Dr. Robert J. Foley, Phyllis K. Foley, Dr. Otto Isaak, and Helen H. Isaak, having moved this Court to dismiss Plaintiff's Complaint on the ground that this Court lacks jursidiction to decide this matter, and the above named defendants having further moved this Court for summary judgment against the Defendants Charles W. Schlaefli and Benjamin Schlaefli on their cross claim against the Defendants Foley and Isaak, and the first named defendants having further moved to strike plaintiff's Amended Complaint, and said Motions having come on for hearing on the 11th day of May, 1976, before the Honorable E. W. Hertz and the Defendants Foley and Isaak being represented by Everett A. Bogue, and the Defendants Charles and Benjamin Schlaefli being represented by John R. Kabeiseman, and the State being represented by Steven L. Zinter, and the Court after reviewing all the records and files herein including the Affidavits of Everett A. Bogue, Donald Foreman, and Jesse Roberts, and after hearing the oral arguments of all parties, the Court determined that any further proceedings in this cause should be stayed until a final determination is made by the United States Supreme Court as to the location of

the exact boundary between Yankton County, South Dakota and Cedar County, Nebraska; therefore, it is

HEREBY ORDERED that a decision by this Court on Defendants Foley and Isaak's Motion for Dismissal of Plaintiff's Complaint based on a lack of jurisdiction is hereby withheld and this matter is stayed pending a final determination by the United States Supreme Court as to the location of the boundary between Yankton County, South Dakota and Cedar County, Nebraska; and it is

FURTHER ORDERED that any decision on all other issues raised by the Motion for Summary Judgment and the Motion to Dismiss the Amended Complaint will be reserved and withheld until such time as the United States Supreme Court makes a final determination as to the boundary between Yankton County, South Dakota and Cedar County, Nebraska.

Dated this 17th day of May, 1976.

BY THE COURT:

/s/ E. W. Hertz
Judge

ATTEST:
/s/Heather Kuchta
Clerk of Courts

(SEAL)

State of South Dakota, Yankton County, ss.

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

7-19, 1976. Heather Kuchta, Clerk of Courts, Yankton County.

/s/ By Eleanor Gregg

Filed June 1, 1976, Heather Kuchta, Clerk of Courts

State of South Dakota, County of Yankton, ss.

I, Heather Kuchta, Clerk of the Circuit Court in and for Yankton, South Dakota, the same being a Court of record, do hereby certify that the Honorable E. W. Hertz, whose genuine signature appearing on the foreging Order, was at the time of signing the same, a Judge of the Circuit Court of Yankton County, in the First Judicial Circuit of the State of South Dakota, duly qualified and acting, and that all his official acts as such are entitled to full faith and credit.

Witness my hand and official seal at the City of Yankton, in Yankton County, State of South Dakota, this 27th day of July, 1976.

/s/ Heather Kuchta
Clerk of the Circuit Court

(SEAL)

State of South Dakota, County of Yankton, ss.

I, Heather Kuchta, the duly elected, qualified, and acting Clerk of the Circuit Court of the First Judicial Circuit of the County of Yankton, State of South Dakota, which is a court of record, having a seal, hereby certify that: By law I have the custody of the seal and all records, books, documents, and papers of or pertaining to the court;

The Judgment Decree and Court Order hereto annexed are true copies of papers appertaining to the court and on file and of record in the office of the clerk of the court;

I have compared the foregoing copies with the original on file in the office of the clerk of the court; and the same comprise a full, true, and correct transcript therefrom and the whole thereof.

Witness my hand and the seal of the court on 27th July, 1976.

/s/ Heather Kuchta
Clerk of the Circuit Court

(SEAL)

State of Nebraska, County of Cedar, ss.

I, Edward S. Stevens, being duly sworn upon oath do depose and state:

(1) That I am a citizen and resident of the State of Nebraska.

(2) That I am and have been for over 20 years the duly elected County Clerk and Register of Deeds for the County of Cedar, State of Nebraska.

(3) That the Numerical Indexes for land transactions in the County of Cedar, State of Nebraska, are kept in the ordinary course of business and as the Register of Deeds of Cedar County, I am the custodian of such records.

(4) That I have examined the Numerical Indexes for land transactions for the County of Cedar, State of Nebraska, from 1864 to the present and that the indexes show that title and nontitle transactions to the land mass known as Rush and/or Elk Island have been recorded in the County of Cedar, State of Nebraska from 1864 to the present.

(5) Affidavit further states that the above-mentioned Numerical Indexes show a continuous chain of title for Rush and/or Elk Island from 1865 when Helen Auge received a Patent Deed from the United States, through the present Nebraska titleholders, Otto and Helen Isaak and Dr. D. J. and Phyllis H. Foley including a Mechanics Lien affidavit filed by one Larry R. Heine in 1973 and that to

the best of his knowledge all title transactions pertaining to said island have been continually documented in the Numerical Indexes of the County of Cedar in the State of Nebraska.

(6) Affiant further states that to the best of his knowledge all titleholders to said land mass known as Rush and/or Elk Island have been Nebraska titleholders from the original land grant in 1865 to the present.

/s/ Edward S. Stevens

County Clerk and Register of Deeds, County of Cedar, State of Nebraska

(SEAL)

Subscribed in my presence and sworn to before me this 16th day of July, 1976.

/s/ Phyllis Climer

Notary Public

Phyllis Climer, General Notary, State of Nebraska. My Commission expires April 13, 1980.

State of Nebraska, County of Cedar, ss.

I, Shirley Arens, the duly elected, qualified and acting Clerk of the District Court of the Eighth Judicial District of the County of Cedar, State of Nebraska, do hereby certify that Edward S. Stevens whose signature appears to the annexed certificate, was, at the time of signing the same, the duly elected, qualified and acting County Clerk and Register of Deeds of said County of Cedar. That I am acquainted with his handwriting and believe the signa-

ture to be genuine and that all of his official acts as such officer are entitled to full faith and credit.

Witness my hand and Seal of office this 16th day of July, 1976.

/s/ Shirley Arens
Clerk of the District Court

(SEAL)

Subscribed in my presence and sworn to before me this 16th day of July, 1976.

/s/Phyllis Climer, General Notary, State of Nebraska. My commission expires April 13, 1980.

State of Nebraska, County of Cedar, ss.

I, Roger Schwartz, being first duly sworn upon oath do depose and state:

(1) That I am a citizen and resident of the State of Nebraska.

(2) That I am a duly elected County Treasurer for the County of Cedar, State of Nebraska.

(3) That the tax assessment records of Cedar County are kept in the ordinary course of business and that as the duly elected Treasurer of Cedar County, I am the custodian of such records.

(4) That I have examined the tax assessment records for the County of Cedar, State of Nebraska, from 1909 to the present and that the land mass known as Rush and/or Elk Island has continually appeared on the tax rolls of Cedar County from 1909 to the present inclusive with the exception of a brief five year period during the 1930's.

(5) Affiant further states that the land mass known as Rush and/or Elk Island has always been assessed as part of the County of Cedar in the State of Nebraska and that property taxes have continually been collected in the State of Nebraska from 1909 to the present with the exception of the above mentioned period during the 1930's.

(6) Affiant further states that the tax records prior to 1909 are not available to him in that they are no longer stored in the Cedar County Courthouse.

/s/ Roger J. Schwartz

County Treasurer
County of Cedar
State of Nebraska

Subscribed in my presence and sworn to before me this 16th day of July, 1976.

/s/ Edward S. Stevens
Notary Public

Edward S. Stevens, General Notary, State of Nebraska. My Commission expires August 16, 1978.

State of Nebraska, County of Cedar, ss.

I, Edward S. Stevens, County Clerk of Cedar County, State of Nebraska, do hereby certify that Roger Schwartz whose genuine signature appears to the annexed certificate, was at the time of signing the same, the duly elected, qualified and acting County Treasurer in and for the County of Cedar and State of Nebraska. That I am acquainted with his handwriting and believe the signature to the said certificate to be genuine and that all of his official acts as such officer are entitled to full faith and credit.

Witness my hand and Seal of office this 16th day of July, 1976.

/s/ Edward S. Stevens

County Clerk

(SEAL)

Subscribed in my presence and sworn to before me this 16th day of July, 1976.

/s/ Phyllis Climer

Notary Public

Phyllis Climer, General Notary, State of Nebraska. My Commission expires April 13, 1980.

State of Nebraska, County of Lancaster, ss.

I, James Potter, being duly sworn upon oath do depose and state:

(1) That I am a citizen and resident of the State of Nebraska.

(2) That I am and have been since 1970 the State Archivist for the State of Nebraska.

(3) That the official tax list records of Cedar County, State of Nebraska, for 1864 to 1908 were transferred from Cedar County to the State Historical Society in Lincoln, Nebraska on June 15, 1973, and that since that date such records have been in my custody.

(4) That I have examined the tax list records for the County of Cedar, State of Nebraska from 1864 to 1908 and that the land mass known as Rush and/or Elk Island has

continually appeared on the tax rolls of Cedar County from 1864 through 1908 inclusive.

(5) Affiant further states that the land mass known as Rush and/or Elk Island has been assessed as part of the County of Cedar in the State of Nebraska from 1864 to 1908 inclusive.

/s/ James E. Potter

State Archivist
Nebraska State Historical
Society, Lincoln Nebraska

Subscribed in my presence and sworn to before me this 14th day of July, 1976.

/s/ John A. Caleca

Notary Public

(SEAL)

State of South Dakota, County of Yankton, ss.

Martin A. J. Slemp, being first duly sworn says that he is the Director of Assessments of Yankton County, South Dakota, and that the land mass which is located in the Missouri River directly south of the Yankton City Dump in Section 16, of Mission Hill Township South has never been included in the assessment records of Yankton County so far as Affiant has been able to determine.

Affiant further says that he checked the assessment record for the last thirty years and cannot find where Yankton County has had this property assessed, has levied any taxes upon it, or attempted to collect any real estate taxes for more than thirty years.

/s/ Martin Slemp
Director of Assessments of
Yankton County, S. D.

Subscribed and sworn to before me this 7th day of July, 1976.

/s/ Everett A. Bogue
Notary Public

(SEAL)

State of South Dakota, County of Yankton, ss.

Martin Slemp, being first duly sworn says; that he is now and was on August 18, 1965, the director of equalization of Yankton County, South Dakota, and that he received the attached letter dated August 18, 1965 from Mr. Alan Williamson, Assistant Attorney General of the State of South Dakota at that time.

Affiant further says that the land to which reference is made in the attached letter is a land mass which exists south of Section 15, 16 and 17, Township 93, Range 55 in Yankton County, and is commonly referred to as Rush Island or Elk Island; that the island is currently and presently north of the main channel of the Missouri River, but that a chute or arm of the river runs along the north side of the island and the south boundary of said sections 15, 16, and 17.

/s/ Martin Slemp

Subscribed and sworn to before me this 8th day of July, 1976.

/s/ Everett A. Bogue
Notary Public

FRANK L. FARRAR
ATTORNEY GENERAL

STATE OF SOUTH DAKOTA
OFFICE OF
ATTORNEY GENERAL
PIERRE

August 18, 1965

Mr. Martin Slemp
Director of Equlaization
Yankton County
Yankton, South Dakota

Dear Mr. Slemp:

When you were in the office last week you consulted me with reference to the tax situs of certain land which had been by the change of the channel of the Missouri River attached to South Dakota.

You advised that in the flood of '52 and prior years' floods the channel of the Missouri River was changed to the south, and that the original channel or main channel stream of the river is now dry.

I have done some research on this subject and find that this land was attached to South Dakota by reason of "avulsion" which means a sudden change in the channel of the river.

It has been held in the case of State of Nebraska v. State of Iowa. 143 US 359, 36 L Ed. 186; State of Missouri v. State of Nebraska, 196 US 23, 49 L Ed. 372 and State of Arkansas v. State of Tennessee, 246 US 158, 62 L Ed. 638 that:

> " 'avulsion' is a rapid change in the course or channel of the river and does not work any change in the boundary, which remains as it was in the center of the river though no water is flowing therein."

From the facts you have given it is my opinion that the tax situs for the land in question is still in Nebraska as the land is south of the middle of the channel of the Missouri River as it existed when Nebraska was admitted to the Union as a state.

The only way this could finally be determined is by an agreement between

the State of Nebraska and South Dakota approved by Congress or by the Supreme Court of the United States in a case against the State of Nebraska.

I am sorry that I am unable to give you more pleasant news.

Yours very truly,

Alan Williamson

Alan Williamson
Assistant Attorney General

AW:sjb

owners of the land. 1966
Otto Sowe

State of South Dakota, County of Turner, ss.

Charles E. Broz being first duly sworn says:

He was the owner of a fractional interest in Rush Island from about 1955 to 1966 when he sold his interest to Dr. Otto Isaak. He lived on the island with his family from about 1961 to 1966. We were the only family who lived on the island while we were there.

We had four children who attened the Yankton public schools but in 1965 we were notified by the Yankton County authorities we could no longer send our children to Yankton schools unless we paid tuition because the island where we lived was in Cedar County, Nebraska. We then sold out and moved away.

I do not remember that either I or my wife Shirley ever voted in Yankton County after we moved on the island.

When we first moved on the island there was a clear running stream between the mainland and the island—it was about four feet deep and 75 to 100 feet wide. There was good fishing and boating in this stream between the South Dakota shore and the island. Our children swam in this stream. But about 1960 Yankton and the city dump emptied refuse and dirt into the stream until it was eventually closed. Yankton County authorities never exercised any authority or control over the island. The State of South Dakota never exercised any jurisdiction over hunting, trapping, or hunting on the island to my knowledge.

The island was generally reputed to be in Cedar County, Nebraska.

While I lived on the island we built a crossing from the South Dakota shore that is still there. We made application to the Corps of Engineers to build the crossing. We put a large tube (about 42 inches) in the crossing to permit the free flow of water in the stream that ran between the island and the South Dakota shore. The stream continued to flow until it was closed by the action of the Yankton city dump in dumping all kinds of refuse in the stream.

I fenced in the entire island in 1961 along the north side of the island and I and my coowners occupied it to the exclusion of any other person.

/s/ Charles E. Broz

Subscribed and sworn to before me this 14th day of July, 1976.

/s/ Everett A. Bogue

(SEAL)

State of Nebraska, County of Cedar, ss.

I, John Riibe, being duly sworn upon oath do depose and state:

(1) That I am a citizen and resident of the State of Nebraska.

(2) That I am and have been for the past seventeen years the duly elected County Sheriff for the County of Cedar, State of Nebraska.

(3) That I have exercised jurisdiction over the land mass known as Rush and/or Elk Island during the past

seventeen years in the name of the County of Cedar, State of Nebraska.

(4) That during that time I have served process on said land mass in the name of the State of Nebraska, specifically serving process on the following occasion:

(a) To Larry R. Heine, living at his usual place of residence, on November 30, 1973. This area known to me as Rush and/or Elk Island.

(5) Affiant further states that on Monday June 24, 1974 answered a call concerning a disturbance on said island and investigated such complaint on the island.

(6) Affiant further states that to the best of his knowledge the State of Nebraska has maintained exclusive jurisdiction over the land mass known as Rush and/or Elk Island during his seventeen years in office.

/s/ John F. Riibe

Cedar County Sheriff

Subscribed in my presence and sworn to before me this 20th day of July, 1976.

/s/ Phyllis Climer

Notary Public

Phyllis Climer, General Notary, State of Nebraska. My Commission Expires April 31, 1980.

(SEAL)

State of Nebraska, County of Cedar, ss.

I, Shirley Arens, the duly elected, qualified and acting Clerk of the District Court of the Eighth Judicial District of the County of Cedar, State of Nebraska, do hereby cer-

tify that John F. Riibe, whose genuine signature appears to the annexed certificate, was at the time of signing the same, the duly elected, qualified and acting County Sheriff in and for the County of Cedar in the State of Nebraska. That I am acquainted with his handwriting and believe the signature to the said certificate to be genuine and that all of his official acts as such officer are entitled to full faith and credit.

Witness my hand and seal of office this 19th day of July, 1976.

/s/ Shirley Arens
Clerk of the District Court

(SEAL)

State of Nebraska, County of Cedar, ss.

I, Rita J. Stevens, duly appointed Deputy County Clerk of the County of Cedar, State of Nebraska, do hereby certify that records of deeds issued by the sheriff's office pursuant to order of sale are kept in the custody and control of the County Clerk's Office; that I have examined such records and such records indicate that Ralph E. Clements, County Sheriff of Cedar County, Nebraska, did sell, as duly directed, and did issue a deed on May 2, 1950 for the following described property:

> Accretion to part of Section Five (5), Township Thirty-three (33), Range One East (1E) of the 6th P. M., Cedar County, Nebraska, containing Ten (10) acres; also described as follows: Rush Island, Cedar County, Nebraska as surveyed, platted and recorded.
>
> Witness my hand and seal of office this 19th day of July 1976.

/s/ Rita J. Stevens
Deputy County Clerk

(SEAL)

State of South Dakota, County of Yankton, ss.

AFFIDAVIT

Ed Sampson, being first duly sworn says; that he was sheriff of Yankton County, South Dakota from the year 1957 to the year 1967 and that during the time he was sheriff his office exercised no dominion or control over Rush Island or Elk Island southeast of Yankton, and at no time attempted to serve process upon any resident thereof.

/s/ Ed Sampson

Subscribed and sworn to before me this 10th day of July, 1976.

/s/ Everett A. Bogue
Notary Public

Supreme Court, U. S.
FILED
SEP 23 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

ON MOTION FOR LEAVE TO FILE COMPLAINT

REPLY BRIEF FOR PLAINTIFF

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State Publishing Co., Pierre, South Dakota

INDEX

	Pages
Jurisdiction	i
Questions Presented	2
Statement	2
Argument:	
I. South Dakota's Motion For Leave To File A Complaint should be granted for the reason that the United States Supreme Court is the only Court which has complete jurisdiction over the State of Nebraska and the State of South Dakota in an action to determine state jurisdiction of an island which has formed in the middle of a river which forms the boundary between said states.	8
II. South Dakota's Motion For Leave To File A Complaint should not be denied on the basis of Nebraska's assertion that South Dakota has long acquiesced in the exercise of exclusive sovereignty over the island.	11
Conclusion	12

CITATIONS

Cases:

Arkansas v. Tennessee, 246 U.S. 158 (1918)	4
Durfee v. Duke, 375 U.S. 106 (1963)	9
Mississippi v. Arkansas, 415 U.S. 289 (1974)	10
New Jersey v. Delaware, 291 U.S. 361 (1933)	11
New Mexico v. Colorado, 267 U.S. 30 (1925)	11

Statutes:

28 U.S.C.A. 1257(3)	10

Constitutions:

Constitution of the United States, Article III, Section 2	10

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October Term, 1975

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STATE OF SOUTH DAKOTA,

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vs.

STATE OF NEBRASKA,

Defendant.

ON MOTION FOR LEAVE TO FILE COMPLAINT

REPLY BRIEF FOR PLAINTIFF

JURISDICTION

The original jurisdiction of this Court has been invoked, pursuant to Article III, Section 2, Clause 1, of the Constitution of the United States, and 28 U.S.C. § 1251.

QUESTIONS PRESENTED

1. Should South Dakota's Motion For Leave To File A Complaint be granted for the reason that the United States Supreme Court is the only Court which has complete jurisdiction over the State of South Dakota and the State of Nebraska in an action to determine state jurisdiction of an island which has formed in the middle of the Missouri River which forms the boundary between said states.

2. Should South Dakota's Motion For Leave To File A Complaint be denied on the basis of Nebraska's assertion that South Dakota has long acquiesced in the exercise of exclusive sovereignty over the island.

STATEMENT

In its brief, the State of Nebraska has submitted factual data in an attempt to demonstrate that the State of Nebraska has long exercised exclusive jurisdiction over the island in question. Based upon that factual data, the State of Nebraska argues at great length that South Dakota has conceded any claim of right to the island by acquiescence. However, as will hereinafter be set forth, the State of South Dakota has recognized and asserted its dominion over the island for a number of years.

Before setting forth the specific incidents wherein South Dakota has exercised jurisdiction over Rush and/or Elk Island, the development of the island should be reviewed to assist the Court in understanding the limited nature of the jurisdiction asserted by the State of Nebraska. The island, as it now exists, contains approximately 1,000 acres and consists of several islands which were formed at different times and accreted

together. The southeast corner of the island would encompass a part of the original situs of Island No. 1, which later became known as Rush Island. Island No. 1 was surveyed in 1862 and was described as containing 132.60 acres. It was found in the survey to be a part of the territory of Nebraska. At the time of the survey, the main channel of the river flowed to the north of that island, although by 1893 the main channel had shifted and flowed to the south of the island. During the early part of this century, the original Island No. 1 diminished in size or disappeared altogether. Shortly before the turn of the century, several small islands emerged from the river in the vicinity of Island No. 1. During the 1930's and 1940's, these islands accreted together to form two separate islands, one of which now constitutes the northern portion of Elk and/or Rush Island and the other which constitutes the southern portion of that island. It was not until the early and middle 1950's that the two islands joined together to form the island as it now exists. Prior to approximately 1955, the northern portion of the island was sandy, partially flooded, and unfit for any practical use.

The State of Nebraska has assessed and collected real property taxes on "one" of the islands that now constitute Elk and/or Rush Island for a number of years. Until recent times, neither Nebraska nor South Dakota collected real property taxes for the remaining islands which have been in existence for a number of years and now constitute the major portion of Elk and/or Rush Island.

In 1909, the records of Cedar County, Nebraska indicate that 160.1 acres of "Rush Island" were assessed in Nebraska and 100 of those acres were described as "in river." Apparently, the "Rush Island" referred to was Island No. 1, claimed by

Nebraska pursuant to the 1862 survey. In 1913, only 60 acres of the one island were assessed in Nebraska. From 1917 to 1933, a mere 10 acres of "Rush Island" were assessed in Cedar County, Nebraska, despite the fact that a substantial portion of the 1,000 acres of what is now Elk and/or Rush Island had surfaced by that time in the form of two large islands and several smaller ones. From 1934 up to and including 1938, no part of "Rush Island" was assessed in Nebraska. Arguably, Nebraska did not assess any part of the island during those five years since the original Island No. 1 had completely washed away. From 1939 to 1953, 230 acres were assessed in Nebraska. Between 1953 and 1956, the assessment records indicate that the number of acres assessed in Nebraska was reduced to 140. The records further reveal that only 10 acres had accreted to the island over those years. During that period of time, almost all of the present island had come into existence in the form of one relatively large island to the north, one relatively large island to the south, and several smaller islands. It was not until 1957, (about the time of the Nebraska quiet title action), that Nebraska assessed and collected real property taxes on the entire land mass constituting Elk and/or Rush Island. In that year, and up to the present, Nebraska has assessed and collected real property taxes on 980 acres of the island.

During the same period that Nebraska has assessed and collected real property taxes for the entire island, South Dakota has also exercised jurisdiction over the island. Notwithstanding the affidavit of Martin A. Slemp, attached to the Defendant's brief (See App. 41), wherein he states that for the past thirty years he cannot find where Yankton County, South Dakota "has levied any taxes upon it (Elk and/or Rush Island)," South Dakota has levied and collected taxes for personal property on

the island since 1955. Henry Huntley, who resided on the northern portion of the island from 1955 to 1960, paid personal property taxes to Yankton County, South Dakota during that entire period of time. Taxes were also assessed and collected by Yankton County, South Dakota between 1959 and 1965 from Charles and Shirley Broz for their personal property when they resided on the northern portion of the island. Moreover, Kenneth Sudbeck, who currently resides on the island, and has so resided for the past two years, also paid personal property taxes to Yankton County for his personal property situated on the island for the years 1975 to 1976. The same Kenneth Sudbeck purchased South Dakota license plates for his automobile in 1975 and 1976 and is registered to vote in Yankton County, South Dakota.

South Dakota peace officers have also exercised dominion and control over the island. In January of 1959, one LeRoy Blakey was murdered on the island. Ed Sampson of the Yankton County, South Dakota sheriff's office and the South Dakota Department of Criminal Investigation, a division of the South Dakota Attorney General's Office, fully investigated the matter from the beginning and the South Dakota Division of Criminal Investigation has continued the investigation to the present. Therefore, the affidavit of Ed Sampson, attached to the Defendant's brief (See App. 49), wherein he states that while he was sheriff of Yankton County from 1957 to 1967, "his office exercised no dominion or control over Rush or Elk Island," is not altogether accurate. It should also be noted that Nebraska law enforcement officials were not involved in this investigation at any time.

The Yankton County Sheriff's Office has exercised juris-

diction over the island on several other occasions. Approximately one year ago, the present sheriff of Yankton County went to the Sudbeck residence on the island in response to a complaint about a dog. Also in 1975, a shot was fired in the vicinity of Yankton County Deputy Sheriff, Dave Hunnoff, while he was patrolling the island. Deputy Hunnoff has also in the past recovered a missing boat and motor from the island. In 1969, Yankton County Sheriff, Jeff Scott, recovered stolen property from a building located on the island.

In addition, South Dakota game wardens have long asserted South Dakota dominion over the island. South Dakota Game Warden, Bill Shadick, regularly patrolled the island for game violations while he was stationed in Yankton County from 1964 to 1971. During that period of time, he patrolled the island at least once each month, and more frequently during hunting seasons. At least one individual arrested by Warden Shadick was convicted in South Dakota courts for game violations on the island. Depite his extensive patrolling of the island, Warden Shadick has never observed a Nebraska game warden on the island. Warden Shadick is also aware of numerous South Dakota residents who have hunted on the island.

Ron Katlin, a South Dakota game warden in Yankton County from 1971 to the present, has also patrolled the island for game violations. Warden Katlin, like Warden Shadick, has never observed a Nebraska game warden on the island. In the past, he has placed the island under observation because of numerous poaching complaints. Additionally, he has recovered and returned to the island a number of owls that had been illegally removed from the island.

The Yankton County, South Dakota school system has educated the children of at least three families that resided on the island. From 1955 to 1961, the children of Henry Huntley attended Yankton schools without paying non-resident tuition. The children of former island resident Charles Broz attended school in Yankton County as residents of the South Dakota school district from 1961 to 1965. Leslie Logan, another former resident of the island, sent one of his children to the Yankton schools from 1955 to 1959. His child, like the Broz and Huntley children, received their education tuition free in South Dakota.

The State of Nebraska has attached to their brief a letter, dated August 18, 1965, from a former South Dakota Assistant Attorney General (See App. 43 and 44), wherein the Assistant Attorney General stated that in his opinion "certain land" (presumably Elk and/or Rush Island) is situated within the boundary of Nebraska. Based upon this letter, Nebraska insinuates in its brief that South Dakota has expressly recognized its lack of jurisdiction over the island. However, it should be noted that the unofficial opinion contained in that letter was based on facts presented to the Assistant Attorney General by Yankton County Director of Equalization. The letter does not indicate what facts were submitted and formed the basis of the opinion. In any event, as heretofor indicated, South Dakota has continued to exercise dominion and control over the island despite the issuance of that letter.

ARGUMENT

I

SOUTH DAKOTA'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD BE GRANTED FOR THE REASON THAT THE UNITED STATES SUPREME COURT IS THE ONLY COURT WHICH HAS COMPLETE JURISDICTION OVER THE STATE OF SOUTH DAKOTA AND THE STATE OF NEBRASKA IN AN ACTION TO DETERMINE STATE JURISDICTION OF AN ISLAND WHICH HAS FORMED IN THE MIDDLE OF THE MISSOURI RIVER WHICH FORMS THE BOUNDARY BETWEEN SAID STATES.

In Nebraska's brief in opposition to South Dakota's motion for leave to file its complaint, Nebraska argues that this Court should not exercise its original jurisdiction because the state courts in both South Dakota and Nebraska have held, in law suits involving private parties, that the land herein controversy, lies within Cedar County, Nebraska, and for the further reason, that there is presently pending a quiet title action in the First Judicial Circuit of South Dakota that Nebraska contends is the appropriate forum to decide this dispute. However, neither the case law cited by Nebraska, nor sound reasoning supports their position.

Nebraska's entire argument is based upon one premise—that the Circuit Court of the First Judicial Circuit of the State of South Dakota in the quiet title action presently stayed pending this action, and the District Court of Cedar County, Nebraska in a prior private quiet title action, have the jurisdiction to determine where the boundary between two states should be. However, in *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S.Ct. 301,

62 L.Ed. 638 (1918), this court affirmed the principle that state court dispositions of boundary locations between states are in each case limited by the interstate boundary and cannot be permitted to press back the boundary line from where it otherwise should be located.

It is true, that state courts may determine whether they have subject matter jurisdiction of land that is involved in a boundary dispute, and if such a state court decides that it does have subject matter jurisdiction, it may proceed to decide the case; however, as was emphasized in *Durfee* v. *Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963), at 193:

> Nothing there decided, (a quiet title action in Nebraska involving private parties), and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them, or as to the respected sovereignty over the land in question. . . . Either state may at any time protect its interest by initiating independent judicial proceedings here. . (Emphasis added.)

Therefore, the boundary dispute between Nebraska and South Dakota in the case at bar, can only be decided by a decision from this Court.

In its brief in opposition, Nebraska has cited cases, not dealing with state boundary disputes, for the proposition that this Court should exercise its jurisdiction sparingly. However, a review of the state boundary dispute cases decided by this

Court indicates that traditionally, this Court has applied a much less restrictive standard in accepting jurisdiction over state boundary disputes than other types of state controversies. Furthermore, as is evidenced by the recent boundary dispute case of *Mississippi* v. *Arkansas*, 415 U.S. 289, 94 S.Ct. 1046, 39 L.Ed.2d 333 (1974), this Court has shown its willingness to accept cases involving boundary disputes between states after a state court has stayed further proceedings in a pending quiet title action until a final determination of the boundary issue was decided by the United States Supreme Court.

Even if South Dakota was able to overcome the stay now ordered by the South Dakota Court and successfully prevail in the pending quiet title action, Nebraska could not be made a party and therefore would have no interest in, or right to ask for certiorari under 28 U.S.C. Section 1257 (3). As a result, this boundary dispute would remain unsettled. If South Dakota was to follow the procedure outlined by Nebraska, the pending South Dakota quiet title action would result in nothing more than another meaningless judgment in the growing list of suits arising out of this disputed boundary.

A review of this Court's cases makes it clear that neither the pending South Dakota quiet title action nor any previous quiet title actions can bind both states to a boundary in this matter. The only way in which the State of Nebraska will be compelled to observe the true boundary between the states, is to have this matter decided by this Court. Because Nebraska contends the entire island lies within its boundaries, and because South Dakota contends that the vast majority of the island is within South Dakota's boundaries, this case clearly involves a controversy between the states within the meaning of

Article III, Section 2 of the Federal Constitution, and as this Court is the only place in which the states can get adequate relief. The original, exclusive jurisdiction of this Court should be exercised.

II

SOUTH DAKOTA'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD NOT BE DENIED ON THE BASIS OF NEBRASKA'S ASSERTION THAT SOUTH DAKOTA HAS LONG ACQUIESCED IN THE EXERCISE OF EXCLUSIVE SOVEREIGNTY OVER THE ISLAND.

This Court has repeatedly held that where two states recognize and acquiesce in a particular boundary line over a long course of years, the states are bound to that boundary line, even if it is later ascertained that the line so recognized varies from the original and true boundary. See for example, *New Mexico* v. *Colorado*, 267 U.S. 30, 45 S.Ct. 202, 69 L.Ed. 449 (1925); and *New Jersey* v. *Delaware*, 291 U.S. 361, 54 S.Ct. 407, 78 L.Ed. 847 (1933).

However, the State of South Dakota submits that this rule is not applicable to the present situation. Based upon the facts presented herein, it cannot be said that South Dakota has long recognized and acquiesced in a particular boundary, or that Nebraska has exercised exclusive dominion over the property in question. Instead, the facts merely show that Nebraska taxed one of the islands that now constitute Elk and/or Rush Island for a period of time; that prior to 1957, neither state levied nor collected real property taxes over the remaining islands that now form the major portion of Elk and/or Rush Island; that after the several individual islands accreted together (including

the island taxed over the years by Nebraska) to form the present 1,000 acre island, Nebraska began, in 1957, to assess and collect real property taxes for the entire island; that the only other act whereby Nebraska exercised jurisdiction over the island occurred in 1973 when the sheriff of Cedar County, Nebraska served process on a resident of the island; and that South Dakota has exercised jurisdiction over the island by collecting personal property taxes for property located on it, providing police protection for the island, patrolling the island for game violation, educating the children of residents of the island, and the other acts heretofor mentioned in the Statement contained in this brief.

CONCLUSION

Based upon the foregoing, the State of South Dakota respectfully requests this Court to grant the previously filed Motion For Leave To File A Complaint.

Dated at Pierre, South Dakota, on this 22nd day of September, 1976.

Respectfully submitted,

STATE OF SOUTH DAKOTA, *Plaintiff,*

BY: _____

DONALD D. FOREMAN
Assistant Attorney General
State of South Dakota
State Capitol Building
Pierre, South Dakota 57501
Telephone: (605) 224-3215

Attorney for Plaintiff.

CERTIFICATE OF SERVICE

Service of Reply Brief For Plaintiff, was made this 22nd day of September, 1976, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to the following individuals:

Paul Douglas	J. James Exon
ATTORNEY GENERAL	GOVERNOR
State Capitol	State Capitol
Lincoln, Nebraska	Lincoln, Nebraska

In addition, I hereby certify that all parties required to be served have been served.

Dated this 22nd day of September, 1976.

DONALD D. FOREMAN
Assistant Attorney General
State of South Dakota

Supreme Court, U. S.
F I L E D
OCT 29 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

ANSWER

PAUL L. DOUGLAS
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State of Nebraska

2115 State Capitol Building
Lincoln, Nebraska 68509
Telephone (402) 471-2682

Attorney for Defendant.

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

In The

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

ANSWER

COMES NOW the defendant, State of Nebraska, by its Attorney General, Paul L. Douglas, and states as follows in answer to the plaintiff's Complaint:

I.

The defendant makes no response to the allegations of jurisdiction contained in paragraph I of the Complaint.

II.

The defendant admits that this action involves an island located in the Missouri River commonly referred to as Elk Island or Rush Island, but denies that Elk Island and Rush Island are presently or were originally separate and distinct islands. The defendant admits that the present northern boundary of the disputed island is a branch channel of the Missouri River which is artificially obstructed by the Yankton, South Dakota, City Dump. The subject island is located north of the present main channel of the Missouri River. The defendant denies the other material allegations of paragraph II of the Complaint, and specifically denies that the subject island lies within the boundaries/borders of the State of South Dakota.

III.

The defendant admits that it contends that the subject real estate lies within the boundaries/borders of the State of Nebraska.

IV.

The defendant denies the allegations of paragraph IV of the Complaint.

V.

(a) The defendant admits that portion of paragraph V (a) of plaintiff's complaint which alleges that the plaintiff has instituted an action to quiet title to a portion of the disputed real estate in its own courts, and that the South Dakota Circuit Court would have no jurisdiction should the disputed real estate be determined to be within

the boundaries of the State of Nebraska. The defendant denies that portion of paragraph V (a) which alleges that its contentions are causing delay and uncertainty in that proceeding, however, for the reason that the defendant is not a party to that proceeding and has made no contentions therein, and furthermore for the reason that the South Dakota Circuit Court has the authority to determine its own jurisdiction so that any delay and uncertainty is unnecessary.

(b) The defendant admits that the State of Nebraska or political subdivisions thereof have collected real estate taxes levied against the disputed real estate for a considerable number of years, and that it is intended that such practice shall continue in the foreseeable future. The defendant denies that portion of paragraph V (b) which alleges that taxation by the defendant has resulted in a considerable loss of revenue for the plaintiff since the plaintiff has no jurisdiction over such real estate, has no right to such revenues received, and has never itself attempted to levy real estate taxes against the disputed real estate.

(c) The defendant denies the allegations contained in paragraph V (c) of plaintiff's complaint in that it has historically been recognized by various state and local agencies and subdivisions of both states that the disputed real estate was and is within the boundaries of the State of Nebraska for administrative purposes. The defendant has no knowledge concerning plaintiff's allegations that various state and local agencies and subdivisions of the State of South Dakota have been "confused" concerning the location of the disputed real estate within its boundaries, and therefore denies said allegations.

VI.

The defendant states that the following described real estate and accretions thereto lie within the boundaries of the State of Nebraska:

Rush Island in the Missouri River, said island being a part of Sections 5, 6, and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's Record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 862 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1, East in Cedar County, Nebraska.

VII.

The defendant states that the main channel of the Missouri River at the time of the creation of Nebraska Territory, Dakota Territory and the State of Nebraska, as well as at all other times pertinent to this lawsuit, flowed to the north of the present island. Subsequently, due to a series of avulsions followed by the construction of Gavins Point Dam in the middle 1950's several miles upstream from said island, the main channel of the Missouri River has stabilized to the south of the said island. The channel north of said island is presently artificially obstructed by the Yankton, South Dakota, City Dump.

VIII.

The defendant states that since its inception it has considered said island to be within its jurisdiction, and that the State of Nebraska, its agencies and subdivisions, have historically dealt with such island as part of the State of Nebraska. The plaintiff, however, has only very recently attempted to make any claim concerning said island, prior to which the State of South Dakota, its agencies and subdivisions had for a long period of time acquiesced in the exercise of jurisdiction over the island by the State of Nebraska, its agencies and subdivisions.

WHEREFORE, defendant prays:

1. That the relief prayed for by plaintiff be denied and that plaintiff's complaint be dismissed.

2. That a decree be entered declaring that the real estate in dispute is located within the boundaries of the State of Nebraska.

3. That if the court deems it necessary to appoint a special master, the special master be initially directed to make findings and recommendations only concerning the issue as to whether the plaintiff has acquiesced in the defendant's exercise of sovereignty for a sufficient period so that the disputed island should be legally considered to be within the boundaries of the State of Nebraska, thereby eliminating the necessity of both parties expending a great deal of time and expense litigating other unnecessary issues.

4. That defendant recover its costs and disbursements, including reasonable attorney's fees.

5. For such other relief as this court may deem equitable under the circumstances.

Dated this 27th day of October, 1976.

Respectfully submitted,

PAUL L. DOUGLAS
Attorney General
State of Nebraska

MOTION FILED
NOV 22 1976

ORIG. -72

In The

Supreme Court of the United States

October Term, 1975

STATE OF SOUTH DAKOTA,

Plaintiff

vs.

STATE OF NEBRASKA,

Defendant

MOTION OF ROBERT J. FOLEY, PHYLLIS K. FOLEY, AND OTTO ISAAK FOR LEAVE TO INTERVENE AS DEFENDANTS AND TO FILE COMPLAINT IN INTERVENTION AND BRIEF IN INTERVENTION AS DEFENDANTS.

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INDEX

Page

Motion for Leave to File Intervenors' Complaint in Intervention 1

Complaint in Intervention 7

CASES CITED

Missouri v. Kentucky, 11 Wall. 395, 20 Law Ed. 116..... 5

Nebraska v. Iowa, 143 U. S. 359, 370, 36 Law Ed. 186, 190 5

State of Arkansas v. State of Tennessee, 310 U. S. 563, 84 Law Ed. 1362 5

STATUTE CITED

Section 5-3-9 of the South Dakota Compiled Laws of 1967 5

TEXT CITED

72 Am. Jur. 2d, States, Sec. 27, page 431 5

CONSTITUTION CITED

Article 8, Section 10 of the South Dakota Constitution..... 5

In The

Supreme Court of the United States

October Term, 1975

STATE OF SOUTH DAKOTA,

Plaintiff

vs.

STATE OF NEBRASKA,

Defendant

MOTION OF ROBERT J. FOLEY, PHYLLIS K. FOLEY, AND OTTO ISAAK FOR LEAVE TO INTERVENE AS DEFENDANTS AND TO FILE COMPLAINT IN INTERVENTION AND BRIEF IN INTERVENTION AS DEFENDANTS.

Robert J. Foley, Phyllis K. Foley, and Otto Isaak respectfully ask the court for permission to intervene as defendants and to file their complaint in intervention and brief in intervention in the above entitled action on the ground that movants' claim and defense in the main action have questions of law or fact in common with those asserted by the defendant, and state that the exercise of the court's discretion in permitting intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

Movants are the owners and in possession of a tract of land in Cedar County, Nebraska, described as:

> Rush Island in the Missouri River, said island being a part of Sections 5, 6, and 7, Township 33, Range 1

East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska,

to which their remote grantors acquired record title by patent dated March 28, 1865, to Rush Island in Sections 5 and 6, Township 33 North, Range 1 East, consisting of 147.65 acres and to which have been added accretions

from the Missouri River until said Island and accretions have developed into the land mass hereinabove described.

Intervenors contend that the premises above described are now and at all times have been located in the State of Nebraska as set out in the brief of the State of Nebraska.

Intervenors and applicants claim an interest relating to the location of the boundary between the states at the point where the island is located which is the subject of the main action, and that the disposition of the action may as a practical matter impair or impede applicants' ability to protect their interests unless adequately represented as intervenors in said action.

A plat of Township 93, Range 55 in Yankton County, South Dakota, was originally filed in the Office of the Register of Deeds of Yankton County, South Dakota, disclosing the location of the Missouri River along its southern border. Directly south and across the channel the original plat of Township 33, Range 1, East of the 6th P. M., in Cedar County, Nebraska, was filed in the Surveyor General's office at Leavenworth, Kansas, on February 18, 1863. This plat discloses the Missouri River along a portion of the north boundary of Cedar County and the existence of Rush Island, containing 147.65 acres in Sections 5 and 6 in said township and range. This survey also disclosed the location of Section 16, Township 93, Range 55 in Yankton County, Dakota Territory on the north side of the river.

Intervenors would sharply dispute plaintiff's statement that the main channel of the Missouri River flowed to the south of Rush Island in 1889.

Intervenors state that the aerial photographs referred to on page 3 of plaintiff's motion for leave to file their complaint together with an aerial photograph from the files of the Department of the Army taken on September 12, 1930, conclusively show the main channel of the Missouri River flowing along the north side of Rush Island and the south side of Yankton County as late as 1930 and then shifting by avulsion to the south side of the island.

In 1966, the United States Department of the Interior geological survey prepared maps locating Rush Island south of Yankton County in Cedar County, Nebraska, but north of the main channel of the Missouri River by that time.

The action of the River as it avulsed Rush Island to the north and developed a new channel to the south of the island, is readily demonstrated by the aerial photographs referred to by the plaintiff. As the channel developed, the flow of water north of the island gradually decreased until it finally left dry its old channel on the north side of the island except for an arm of the river which still runs along the north side of the island between the island and the South Dakota shore.

Intervenors assert that the record clearly supports the conclusion reached by the defendants and those here urged by intervenors, that Rush Island and its accretions reached the north side of the channel of the Missouri River by avulsion as a result of which the established boundary between the states did not change, but remained

the same because it was at the time of the original surveys and plats of the two states that the boundary was fixed by the Constitutions of the states of Nebraska and South Dakota and approved by Congress as the center of the main channel of the Missouri River.

That such an avulsion does not affect or change the boundary between states has been repeatedly held by this court. *Missouri v. Kentucky,* 11 Wall. 395, 20 Law Ed. 116; *State of Arkansas v. State of Tennessee,* 310 U. S. 563, 84 Law Ed. 1362. To the same effect are text statements supported by abundant authority in 72 Am. Jur. 2d, States, Sec. 27, page 431, where it is said, "In a case where a river has subsequently turned its course, and runs on the other side of an island, the boundary between the states remains as before and the island does not, in consequence of this action of the water, change its owner, even if the change occurred gradually and by natural means." See also *Nebraska v. Iowa,* 143 U. S. 359, 370, 36 Law Ed. 186, 190.

The real interest of the State of South Dakota in this litigation is to have this court so relocate the boundary between the states of Nebraska and South Dakota that instead of passing along the north boundary of the island as was adjudicated by a Yankton County Circuit Court it passes either through or to the south of the island so that the State of South Dakota through the Division of School and Public Lands can claim ownership and title under Article 8, Section 10 of the South Dakota Constitution and Section 5-3-9 of the South Dakota Compiled Laws of 1967, and thereby oust and evict intervenors from land

which they have owned for more than twenty years, and for which they have paid their predecessors full, fair consideration.

Wherefore intervenors ask the court for leave to intervene and leave to file their complaint in intervention and serve copies thereof upon the appropriate officers in South Dakota and Nebraska.

Respectfully submitted,

EVERETT A. BOGUE

Post Office Box 435
Vermillion, South Dakota 57069

Attorney for the Intervenors

In The

Supreme Court of the United States

October Term, 1975

—o—

1975 No. 72, Original

—o—

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, his wife as joint tenants and their survivor, and OTTO ISAAK,

Intervenors.

—o—

COMPLAINT IN INTERVENTION

Come now the intervenors in the above entitled action and allege:

I.

That intervenors claim an interest relating to the property or transaction which is the subject of this action, and

that they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest unless applicant's interest is adequately represented by parties who are before the court.

II.

That the representation of intervenors' interests by existing parties is or may be inadequate and applicants are or may be bound by a judgment of this court in this action in that if this court decides that any part of Rush Island is within the boundaries of South Dakota, plaintiff will claim title thereto for the Division of School and Public Lands under the Constitution and Statutes of the State of South Dakota.

III.

Intervenors claim the following described real estate lies within the boundary and borders of the State of Nebraska, namely

> Rush Island in the Missouri River, said island being a part of Sections 5, 6, and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence runnig 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north

59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 365 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, and that intervenors are the record owners thereof

IV.

That Rush Island is and has been since the date of the original survey of Cedar County, Nebraska, a part of that recorded survey consisting of approximately 147.65 acres at the time of the survey, until by avulsion the main channel of the Misouri River moved from the north side of said island to the south side thereof, leaving Rush Island an undisturbed and identifiable tract as platted under the original government survey, and that through the years said river by accretion added land to and along the north side thereof until it reached its proportions as hereinbefore described.

V.

That by reason of the avulsion of the channel of the river to the south side of Rush Island the boundaries between the two states did not change but remained the same boundary as was established at the time of the original plats and surveys of Cedar County Nebraska and Yankton County, South Dakota.

VI.

That there at no time has been more than one island described and identified as Rush Island, and that the name of Elk Island is spurious, meaningless and of no effect whatever in identifying any tract or tracts of land, and that the accretion to the north of Rush Island accreted thereto as a result of the action of the Missouri River in through the years adding year after year, little by little in the form of bar or otherwise to the north shore of Rush Island.

VII.

That the contentions of the plaintiff are erroneous and have no basis in fact or law but are in reality an attempt to acquire for the State of South Dakota, a substantial tract of farm land which has been developed by intervenors and their predecessors in interest since the issuance of the Government Patent to Rush Island in 1865.

VIII.

That intervenors and their predecessors in interest have paid real estate taxes to Cedar County, Nebraska, for more than forty years without interruption or any claim of right title or interest on the part of Yankton County, or

the State of South Dakota, and that the one half interest in said premises acquired by the intervenors Foley was acquired by them with full reliance upon an opinion of the Attorney General of the State of South Dakota in 1965, and that in reliance thereon said intervenors have paid out many thousands of dollars.

Wherefore intervenors pray that it be adjudged and decreed as follows:

(a) That plaintiffs' complaint be dismissed upon its merits.

(b) That the real property described in paragraph three of intervenors' complaint is a part of the State of Nebraska.

(c) That the boundary between Township 93, Range 55, Yankton County, South Dakota, and Township 33, Range 1, East of the 6th P. M. in Cedar County, Nebraska, is the arm of the Missouri River which runs along the north shore of Rush Island and the south shore of South Dakota.

(d) That intervenors have such other and further relief as the Court may deem just and equitable together with their costs and disbursements herein.

Dated November 5, 1976.

Respectfully submitted,

EVERETT A. BOGUE

Vermillion, South Dakota

Attorney for Intervenors

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SUPREME COURT

SUPREME COURT OF THE UNITED STATES

NO. 72 Original

STATE OF SOUTH DAKOTA,)
)
PLAINTIFF,)
)
v.)
)
STATE OF NEBRASKA,)
)
DEFENDANT.)

REPORT OF SPECIAL MASTER
AND
RECOMMENDATION

In its Order, entered October 4, 1976, the Supreme Court of the United States, on consideration of the Motion for Leave to file a Bill of Complaint, granted the Motion of the plaintiff and allowed the State of Nebraska, defendant, thirty (30) days in which to answer.

On November 22, 1976, Robert J. Foley, Phyllis K. Foley, and Otto Isaak filed a Motion for Leave to Intervene as defendants in intervention and brief in intervention as defendants. In its Order of December 6, 1976, appointing the Honorable Oren Harris, Senior Judge, United States District Court for the Western District of Arkansas, Special Master in the case, the Court referred the Motion of Robert J. Foley, et al., for leave to intervene to the Special Master.

On January 26, 1977, the Special Master advised counsel for the parties that it is well established that procedures governing the exercise of the Supreme Court's original jurisdiction are not invariably governed by common-law precedent or current rules of civil procedure. United States Supreme Court, Rule 9. The parties were further

advised that the Federal Rules of Civil Procedure, where appropriate, may be used as a guide as to procedure which will be utilized by the Special Master.

On the Motion of Robert J. Foley, et al, for leave to intervene as defendants and to file Complaint in Intervention, the Special Master directed counsel for the parties to file briefs with the Special Master. Such briefs have been received from counsel for the parties. Consideration has been given to the contentions of the parties on the Motion and, pursuant to reference of the Motion for Leave to Intervene to the Special Master by the Court, this report is submitted with the recommendation that an Order be entered granting leave to file complaint in intervention and that the intervenors be designated parties defendant in the case.

The stated purpose of the litigation is to determine jurisdiction between the States of South Dakota and Nebraska over an Island situated in the Missouri River, which forms the boundary between the States. The interest of South Dakota and Nebraska is to determine and protect their boundaries and sovereignty over real property within those boundaries against any encroachment.

From the record and briefs filed with the Special Master, there are approximately 994 acres involved in the dispute. The Movants (intervenors) contend they are the owners and in possession of the property to which their remote grantors acquired record title by patent dated March 28, 1865, consisting of approximately 147.65 acres and to which have been added accretions from the Missouri River until the Island and accretions have developed into the land mass presently in dispute. Intervenors contend that the

real estate is now and at all times has been located in the State of Nebraska. The intervenors claim that the disposition of the dispute between the States may impair or impede their ability to protect their interest unless adequately represented as intervenors in the litigation.

The intervenors are citizens of South Dakota. The record discloses that there is a probable conflict between the intervenors and the State of South Dakota as to the ownership of the property. It is claimed, and with good reason, that, should South Dakota prevail and it be determined that the Island is located within the State of South Dakota, the State, by its appropriate agency, would claim title to the lands against the Movants.

The primary interest of the State of Nebraska is to protect its boundaries and sovereignty, without regard to the ownership of the property.

The intervenors' claims and defenses as to the major questions of law or fact are in common with those asserted by the defendant and, in the opinion of the Special Master, the exercise of the Court's discretion in permitting intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

In submitting this report, the Special Master respectfully recommends that the Motion of Robert J. Foley, Phyllis K, Foley, and Otto Isaak for leave to intervene as defendants and to file Complaint in Intervention be granted and that an Order be entered by the Court accordingly.

DATED this 8th day of June, 1977.

Oren Harris

OREN HARRIS
SPECIAL MASTER

Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant.

ON MOTION FOR LEAVE TO INTERVENE

BRIEF OF DEFENDANT IN SUPPORT OF REPORT OF SPECIAL MASTER ALLOWING INTERVENTION

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TABLE OF CONTENTS

Subject Index

Pages

Jurisdiction 1

Question Presented 1

Statement 2

Argument:

The report of the Special Master allowing intervention should be adopted since the petitioners for leave to intervene have shown a compelling interest in the proceeding. 2

Conclusion 7

CASES CITED

Kentucky v. Indiana, 281 U. S. 163, 74 L. Ed. 784, 50 S. Ct. 275 (1930) 3, 4

New Jersey v. New York, 345 U. S. 369, 97 L. Ed. 1081, 73 S. Ct. 689 (1953) 4, 7

Oklahoma v. Texas, 253 U. S. 470, 64 L. Ed. 1017, 40 S. Ct. 580 (1920) 7

In The

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

ON MOTION FOR LEAVE TO INTERVENE

BRIEF OF DEFENDANT IN SUPPORT OF REPORT OF SPECIAL MASTER ALLOWING INTERVENTION

JURISDICTION

The original jurisdiction of this court has been invoked, pursuant to Article III, Section 2, Clause 1, of the Constitution of the United States, and 28 U. S. C. § 1251. This court accepted jurisdiction by order dated October 4, 1976.

QUESTION PRESENTED

Whether this court should adopt the report of the Special Master and allow the intervention of the owners of the island in dispute herein in this original action.

STATEMENT

On October 4, 1976, this court accepted jurisdiction of this original action. On November 22, 1976, petitioners for leave to intervene filed a motion for leave to file a complaint in intervention. On December 6, 1976, the Honorable Oren Harris was appointed as Special Master, and the motion for leave to intervene was specifically referred to him. After consideration of the record and briefs submitted by the petitioners and the parties, the Special Master on June 8, 1977, submitted a report and recommendation to this court with the recommendation that an order be entered granting leave to file the complaint in intervention and that the intervenors be designated parties defendant in the case. On July 19, 1977, the plaintiff filed its exception to the Special Master's report taking exception to the recommendation that petitioners be allowed to file their complaint in intervention and be designated parties defendant.

ARGUMENT

The report of the Special Master allowing intervention should be adopted since the petitioners for leave to intervene have shown a compelling interest in the proceeding.

The State of Nebraska recognizes that as a general rule, private parties are not allowed to intervene in an original action involving two sovereign states. It has consistently been recognized, however, that intervention will be allowed where compelling reasons exist to allow

private parties to intervene. It is our belief that the Special Master correctly determined that such compelling reasons exist herein.

In *Kentucky v. Indiana,* 281 U. S. 163, 74 L. Ed. 784, 50 S. Ct. 275 (1930), this court analyzed whether and to what extent private citizens should be allowed to participate as parties in an original action between two states. Indiana and Kentucky entered into a contract to build a bridge over the Ohio River between the two states. Certain citizens and taxpayers of Indiana brought suit in state court to enjoin its officers from carrying out the contract on the ground it was unauthorized and void. Indiana refused to commence performance of the contract until that lawsuit was disposed of. Kentucky then asked leave to file its bill of complaint in an original action before this court against the State of Indiana and the citizens of Indiana who were plaintiffs in the state court lawsuit, seeking to restrain the breach of contract and prosecution of the state court lawsuit and for specific performance of the contract. The court dismissed the citizens of Indiana from the action. In so doing, the court stated as follows:

> "A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters and taxpayers, *merely as such,* of either state, *without a showing of any further and proper interest,* have no separate individual right to contest in such a suit the position taken by the state itself. Otherwise, all the citizens of both states, as one citizen, voter and tax-

> payer has as much right as another in this respect, would be entitled to be heard. . . ." *Id.*, p. 173. (Emphasis added.)

The court relied upon the fact that the individual defendants had not shown any special interest in the lawsuit beyond that of citizens and taxpayers generally, an interest which was properly represented by the State of Indiana.

New Jersey v. New York, 345 U. S. 369, 97 L. Ed. 1081, 73 S. Ct. 689 (1953), involved an original action brought by the State of New Jersey against the State of New York and the City of New York concerning diversion of the waters of the Delaware River. The Commonwealth of Pennsylvania was allowed to intervene. A decree was entered allowing the defendants to divert only a certain amount daily from the river. Pursuant to authority contained in the decree, the City of New York moved for a modification so as to allow diversion of additional quantities of water. The City of Philadelphia requested leave to intervene in the lawsuit. In denying leave to intervene, the court relied chiefly upon the "parens patriae" doctrine, as recognized in *Kentucky v. Indiana, supra*, that the state must be deemed to represent all of its citizens in matters involving a sovereign interest. The court stated that the rule is "a necessary recognition of sovereign dignity as well as a working rule for good judicial administration," *New Jersey v. New York, supra*, p. 373. The court stated further that if the rule were otherwise, the case would be opened to an almost unlimited number of potential intervenors and expanded to the dimensions of a class action, which is not desirable for the

court's original jurisdiction. The court did, however, qualify the general application of the "parens patriae" doctrine by stating that intervention would be allowed if the intervenor could show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state," *Id.*, p. 373. The court then held that Philadelphia had not met that burden and therefore should not be allowed to intervene.

From the foregoing cases, it appears that the test on whether intervention of private parties should be allowed in an original action is two-fold:

(1) Does the intervenor have a compelling interest in his own right beyond that of all other citizens and taxpayers of his state?

(2) If so, is that special interest not properly represented by his state?

In order to be entitled to intervene in an original action, the intervenor must meet both qualifications. In the opinion of the State of Nebraska, the petitioners for leave to intervene have done so.

The Petitioners for leave to intervene, citizens of the State of South Dakota, have an interest different from and greater than all other citizens of the State of South Dakota. The petitioners are record titleholders of the land which is in question. Furhermore, the record establishes that their interest in the lawsuit is *not* adequately represented by the State of South Dakota, under the "parens patriae" doctrine. In fact, their respective interests are diametrically opposed as is evidenced by the

pending lawsuit in the South Dakota state courts between the plaintiff and the petitioners concerning the ownership of the island. As the Special Master found, there is reason to believe that if the island is determined to be within the State of South Dakota, that state would claim title to the lands against the petitioners. In fact, the State of South Dakota has already done so by filing the quiet title action in its state courts. There is no question but that this action could greatly affect the ownership interest of the petitioners. If the island is determined to be within the boundaries of the State of Nebraska, the controversy between the State of South Dakota and the petitioners would be at an end. If, however, the island is determined to be within the State of South Dakota, the petitioners would be in the position of attempting to defend their title against the State of South Dakota's claim under its state law (S. D. C. L. 1967, Section 5-2-4).

It therefore appears that the petitioners for leave to intervene have met the test for being allowed to intervene in an original action. Because of their ownership interest, they do have a compelling interest beyond that of all other citizens and taxpayers of South Dakota. Additionally, it appears that the intervenors' special interest is not properly represented by the State of South Dakota. In fact, their interests are more closely aligned with the State of Nebraska. However, a "parens patriae" relationship does not exist between the State of Nebraska and the petitioners, and the State of Nebraska does not feel it should be placed in the position of representing the interests of South Dakota citizens against their own state in any manner, no matter how slight. Finally, this is not a case in which the allowance of these petitioners to inter-

vene would open the lawsuit to a multiplicity of potential intervenors; and, as was determined by the Special Master, the intervention will not unduly delay or prejudice the rights of the original parties since the intervenors' claims and defenses as to major questions of law or fact are in common with those asserted by the State of Nebraska.

Parties other than sovereign states have been allowed as parties in an original action between two states on other occasions. One obvious example is in *New Jersey v. New York, supra,* wherein the City of New York was made, and allowed to participate as, a party defendant. Even more relevant to this case, however, is *Oklahoma v. Texas,* 253 U. S. 470, 64 L. Ed. 1017, 40 S. Ct. 580 (1920), wherein this court entered the following order without an opinion in an original action involving a boundary dispute:

> *"Order Granting Leave to File Petitions in Intervention.*
>
> "The motions of the Judsonia Developing Association, Burk Divide Oil Company No. 2 and Others, Burk Divide Oil Company No. 3 and others, and Mellish Consolidated Placer Oil Company, for leave to file petitions in intervention herein, are hereby granted; and similar leave is granted to any and all other parties claiming any title to or interest in the lands in the possession of the Receiver herein by virtue of the orders of April 1, 1920, and June 7, 1920."

CONCLUSION

The report of the Special Master should be adopted and petitioners for leave to intervene should be allowed

to intervene as parties defendant in this case because they possess a compelling interest in this lawsuit which is not represented by the State of South Dakota. Allowing the intervention would not hinder or delay the progress of the lawsuit or in any way prejudice the rights of the present parties.

Respectfully submitted,

STATE OF NEBRASKA, Defendant

PAUL L. DOUGLAS
Attorney General

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Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

EXCEPTION TO SPECIAL MASTER'S REPORT OF JUNE 8, 1977 AND BRIEF IN OPPOSITION TO MOTION TO INTERVENE

WILLIAM J. JANKLOW
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Pierre, South Dakota 57501

Attorneys for Plaintiff

PAUL L. DOUGLAS
Attorney General, State of Nebraska

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State Publishing Co., Pierre, South Dakota

INDEX

	Pages
Exception to Special Master's Report of June 8, 1977	1
Brief For Plaintiff in Opposition to Motion For Leave to Intervene	3
Question Presented	3
Statement	4
Argument	4
Conclusion	10
Certificate of Service	11

CITATIONS

Cases:

Kentucky v. *Indiana*, 281 U.S. 163, (173), (174), 74 L.Ed. 784, (797), 50 S.Ct. 275 (1930) 5

New York v. *New Jersey*, 345 U.S., 369, 97 L.Ed. 1081, 73 S.Ct. 689 (1953) 5, 6

Rhode Island v. *Massachusetts*, 37 U.S. 657, (748), 9 L.Ed. 1270, 12 Pet. 747 (1838) 9

United States v. *Nevada*, 412 U.S. 534, 34 L.Ed.2d 132, 93 S.Ct. 2763 (1973) 6

Utah v. *United States*, 394 U.S. 89, 22 L.Ed.2d 99, 89 S.Ct. 761 (1969) 6

Rules:

Rule 24, Federal Rules of Civil Procedure 4, 5

Text:

4 American Law of Property, § 18.17 (A.J. Casner ed. 1952) 8

3 H. Tiffany, The Law of Real Property, § 938-49 (1939) 8

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

EXCEPTION TO SPECIAL MASTER'S REPORT OF JUNE 8, 1977

Be it remembered that in the Supreme Court of the United States before the Honorable Oren Harris, Special Master, the following proceedings were had, to-wit:

Robert J. Foley, Phyllis K. Foley, and Oho Isaak (Intervenors) moved this Court that they be made parties to the above-entitled action as Defendants on the ground that Intervenors claim and defense in the main action has questions of

law or fact in common with those asserted by the Defendants and that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. The Special Master, after considering the briefs of the parties, reported and recommended to the Supreme Court that an Order be entered granting Intervenors leave to file their complaint in intervention and that Intervenors be designated parties Defendant in the case.

To this report and recommendation of the Special Master, the Plaintiff takes exception and submits herewith it's brief in support of said exception.

Respectfully submitted,

STATE OF SOUTH DAKOTA, *Plaintiff,*

BY: _____

DONALD D. FOREMAN
Assistant Attorney General
State of South Dakota
State Capitol Building
Pierre, South Dakota 57501
Telephone: (605) 224-3215

Attorney for Plaintiff.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

BRIEF FOR PLAINTIFF IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

QUESTION PRESENTED

WHETHER THIS COURT SHOULD ALLOW PRIVATE INDIVIDUALS TO INTERVENE IN AN ORIGINAL ACTION TO DETERMINE A BOUNDARY BETWEEN TWO STATES WHEN THE PRIVATE INDIVIDUALS' STATE IS ALREADY A PARTY TO THE LITIGATION.

STATEMENT

Applicants, residents of South Dakota, have sought leave of this Court to intervene in the above-entitled action. In their motion, applicants have requested permission to intervene pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure which governs permissive intervention and they have further alleged in their motion that they are entitled to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedures. Applicants have asserted that they are the owners of the property involved in this boundary dispute and they seek leave to intervene for the purpose of protecting their ownership right.

This Court referred the Motion for Leave to Intervene to the Special Master, the Honorable Oren Harris. On the basis of the briefs submitted by the parties, the Special Master found that the proposed Intervenors should be permitted to intervene pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure. To the recommendation of the Special Master, the State of South Dakota has filed an exception.

ARGUMENT

MOTION FOR LEAVE TO INTERVENE SHOULD PROPERLY BE DENIED SINCE APPLICANTS DO NOT HAVE A COMPELLING INTEREST IN THIS PROCEEDING.

In opposition to applicant's motion, and the report and recommendation of the Special Master, the State of South Dakota submits that no compelling reason exists for permitting intervention by applicants, and in the absence of such a compelling reason, private parties, such as applicants, should not be permitted to intervene in an original proceeding before this Court involving two sovereign states. The State of South

Dakota further submits that in any event, leave to intervene should be denied as a matter of sound discretion in view of the nature of the relief sought by the present parties.

The propriety of allowing intervention by private parties in original actions has been considered by this Court on several occasions. In situations where a party, whose state is already a party to the litigation, has sought leave to intervene in an original action, the Court has consistently recognized that aside from the requirements of Rule 24 of the Federal Rules of Civil Procedure, the party must demonstrate some "compelling interest" in the litigation before he may be allowed to intervene.

In *New York* v. *New Jersey*, 345 U.S. 369, 97 L.Ed. 1081, 73 S.Ct. 689 (1953), the City of Philadelphia sought leave to intervene in an original proceeding in which the Commonwealth of Pennsylvania was already a party. The suit was originally brought to enjoin a proposed diversion of the Delaware River by the City and State of New York. It was conceded that the City of Philadelphia had an interest in the use of the Delaware water and thus an interest in the litigation. However, the court, in citing *Kentucky* v. *Indiana*, 281 U.S. 163, (173), (174), 74 L.Ed. 784, (797), 50 S.Ct. 275 (1930), recognized the principle that a state, "When a party to a suit involving a matter of sovereign interest 'must be deemed to represent all its citizens.' " The court then stated:

> The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties. *New Jersey*, *supra* at 373.

In conformity with this principle, the Court adherred to the rule enunciated in *Kentucky* v. *Indiana*, *supra*, that a proposed intervenor, whose state is already a party to an original proceeding, must prove a compelling interest in the litigation, in his own right, before his intervention may be allowed. On the basis of this rule, the Court denied Philadelphia's Motion for Leave to Intervene since it did not meet the burden of showing such a compelling interest.

The principles set forth in *New York* v. *New Jersey*, *supra*, limiting intervention in an original proceedings, were recently reaffirmed in *United States* v. *Nevada*, 412 U.S. 534, 37 L.Ed.2d 132, 93 S.Ct. 2763 (1973). In that case, this Court denied a motion by the United States for leave to file a complaint invoking original jurisdiction to determine water rights among the United States and two states. The Court denied the motion on the ground that the Federal District Court provided a more suitable forum to litigate the matter. In so ruling, the Court, citing *New York* v. *New Jersey*, *supra*, noted that private parties, with interest in the water rights in question, could participate in the litigation in Federal District Court, whereas they "ordinarily" would not be entitled to participate in their own behalf in an original action.

In *Utah* v. *United States*, 394 U.S. 89, 22 L.Ed2d 99, 89 S.Ct. 761 (1969), a question very similar to the present was presented to this Court. In that case, the State of Utah instituted an original action against the United States to determine ownership of certain lands within the State of Utah. By stipulation, the sovereigns agreed that Utah would not attempt to defeat the claim of the United States by proving that private land owners had superior title to the property in question. An individual who also claimed ownership of certain portions of the property sought leave to intervene to assert his ownership rights.

The Special Master found that the applicant satisfied the grounds for permissive intervention and concluded that if the matter were in Federal District Court, he would be permitted to intervene. However, the Special Master recommended that intervention be denied on grounds not ultimately considered by this Court.

In considering this matter, the Court did not question or discuss the Master's finding that the proposed intervenor satisfied the requirements for permissive intervention. The Court instead placed emphasis on the fact that pursuant to the stipulation between the sovereigns, private ownership claims were not in issue. Since ownership was not an issue, the Court concluded that there was no compelling reason to allow intervention by the property owner and leave to intervene was denied.

In the present proceeding as well, no compelling reason exists for permitting intervention by the private land owners. The proposed Intervenors are South Dakota citizens and their sole alleged interest in this boundary dispute is the protection of their title to the property in question. However, the present suit was brought for the limited purpose of asserting and determining the boundary between two sovereign states. Neither state is claiming ownership of the disputed property in this proceeding and ownership is not an issue in any way.

In reality, Intervenors have no interest in this proceeding since the outcome will not directly effect ownership of their property in any way. Title could be affected if Intervenors claimed ownership on the basis of a grant from the State of Nebraska. Clearly, if this Court found that the property was never located within the State of Nebraska, any patent issued by that state would be null and void. However, Intervenors' claim of ownership is derived from a federal patent. It is a

universally accepted rule that where a title is derived from the federal government, the validity of title is not affected by a determination that the property lies on one side or the other of an interstate boundary. 4 American Law of Property, § 18.17 (A.J. Casner ed. 1952); 3 H. Tiffany, The Law of Real Property, § 938-49).

Intervenors apparently contend that their ownership may be indirectly affected by the decision of this Court since if the disputed areas are declared to be within the boundaries of South Dakota, the State of South Dakota may be able to assert ownership in subsequent proceedings. However, Intervenors' claim of ownership should properly be determined in the state courts. Should Plaintiff prevail in the present suit, it would then be necessary to conclude a quiet title action already pending in the state courts of the State of South Dakota to determine ownership. In the state court proceedings, Intervenors can assert their claim of ownership and, aside from jurisdiction, nothing decided by this Court in the present proceeding will have any bearing on the issues presented therein.

In view of the foregoing, the State of South Dakota submits that the applicant's claim of interest can be catagorized as a mere preference that the property be declared a part of the State of Nebraska in order to assist them in asserting ownership rights in the appropriate state courts. Such an indirect interest does not provide the "compelling reason," within the purview of the heretofore cited cases necessary to permit intervention by a private party in this original action between two states.

The heretofore cited cases (wherein intervention by private parties in original proceedings has been limited) have not been concerned with boundary disputes between states. With respect to boundary litigation, substantial reasons are present in the very nature of the action for denying intervention.

In *Rhode Island* v. *State of Massachusetts*, 37 U.S. 657, (748), 9 L.Ed. 1270, 12 Pet. 747 (1838), the United States Supreme Court, at a very early date, exhibited a clear disinclination to permit participation by private parties in boundary litigation. In that boundary dispute between two states, the argument was advanced, as here, that the inhabitants of the property in dispute should be made parties to the suit. In summarily rejecting that argument, the court stated:

> It might with the same reason be objected, that a treaty or compact settling boundary required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void; as the authority to make it was derived from the legislative power only.

In accordance with the logic set forth in the Rhode Island decision, the ascertainment of the boundary between two states is a sovereign function which should be exercised by the state involved without interference from private individuals motivated by personal goals. To allow intervention by private parties in this boundary litigation would, in effect, allow citizens to participate in a significant sovereign function on an equal basis with the sovereign states involved. It would also permit impeachment of the sovereign policy of the State of South Dakota by its own citizens. Thus, in the exercise of sound discretion, intervention by private parties should properly be denied in boundary litigation due to the very nature of the proceeding.

CONCLUSION

In the present case, no substantial reason has been urged by the proposed Intervenors for allowing their intervention in this matter. Furthermore, they have asserted no substantial interest in this litigation. Their limited interest is nothing more than a mere preference that the property be declared a part of the State of Nebraska to assist them in asserting ownership rights in the appropriate state courts. Such an interest is not the compelling interest required to intervene in an original action before this Court. Moreover, due to the very nature of boundary litigation, substantial reasons exist for denying intervention.

Dated at Pierre, South Dakota, on this 19th day of July, 1977.

Respectfully submitted,

STATE OF SOUTH DAKOTA, *Plaintiff,*

BY: _____

DONALD D. FOREMAN
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State of South Dakota
State Capitol Building
Pierre, South Dakota 57501
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Attorney for Plaintiff.

CERTIFICATE OF SERVICE

Service of Exception To Special Master's Report Of June 8, 1977 and Brief In Opposition To Motion To Intervene was made this 19th day of July, 1977, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to the following individuals:

Paul Douglas	Everett J. Bogue
ATTORNEY GENERAL	Attorney at Law
State Capitol	Box 435
Lincoln, Nebraska	Vermillion, South Dakota 57069

In addition, I hereby certify that all parties required to be served have been served.

Dated this 19th day of July, 1977.

DONALD D. FOREMAN
Assistant Attorney General
State of South Dakota

Supreme Court, U. S.
FILED
AUG 8 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

STATE OF NEBRASKA
Defendant,

AND

ROBERT J. FOLEY, et al.,
Petitioners for Leave to Intervene.

INTERVENOR'S RESPONSE TO PLAINTIFF'S EXCEPTION TO SPECIAL MASTER'S REPORT

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TABLE OF CONTENTS

Pages

Response to Plaintiff's Exception to Special Master's Report 1

Conclusion 4

CASES CITED

Kentucky v. Indiana, 281 U. S. 163, 74 Law. Ed. 784 at 797 ..... 2, 4

New Jersey v. New York, 345 U. S. 369, 97 Law. Ed. 1081 3

Rhode Island v. Massachusetts, 37 U. S. 657, 9 Law. Ed. 1270 3

United States of America v. Nevada, et al., 412 U. S. 534, 37 Law. Ed. 2d 132 3

Utah v. United States, 394 U. S. 89, 22 Law. Ed. 2d 99 3

STATUTE CITED

SDCL 1967, 5-2-4 4

In The

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

STATE OF NEBRASKA
Defendant,

AND

ROBERT J. FOLEY, et al.,
Petitioners for Leave to Intervene.

INTERVENOR'S RESPONSE TO PLAINTIFF'S EXCEPTION TO SPECIAL MASTER'S REPORT

ARGUMENT

Plaintiff's Exception to the Special Master's Report Should Be Overruled

This case is an exception to the rule that a private litigant will not be permitted to intervene in an action over a boundary dispute between two states when the state of the litigant is already a party. Here the interests of plaintiff and intervenor conflict. They are not the same or even similar. Intervenors claim title to and ownership of the island. They and their predecessors have paid taxes on it to Nebraska since 1865. The Attorney General of the State of South Dakota, in 1965 in an official opinion to the Director of Taxation of Yankton

County, South Dakota, said South Dakota had no taxable interest in the island because it was not in South Dakota but was in Nebraska.

The cases cited by plaintiff follow the rule established by this court in *Kentucky v. Indiana*, 281 U. S. 163, 74 Law. Ed. 784 at 797, where the court said:

> "An individual citizen may be made a party where relief is properly sought against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted. * * *
>
> "This gives an individual defendant in such a suit between states full opportunity to litigate the only question which concerns them individually as distinguished from the questions which concern him only in common with all the citizens of his state."

The court further said:

> "A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states must be deemed to represent all its citizens. * * * Citizens, voters and taxpayers, *merely* as such, of either state, without a showing of any further and proper interest have no separate individual right to contest in such a suit the position taken by the state itself."

Petitioners seek to intervene, not because they are *merely* citizens, voters or taxpayers in South Dakota, in this action, but because they have a further and proper interest, in Rush Island, and in consequence an individual right to contest the claims of South Dakota in the pending boundary dispute. The Special Master pointed out, "The record discloses that there is a probable conflict between the intervenors and the State of South Dakota as to the ownership of the property. It is claimed and with good reason that should South Dakota prevail and it be

determined that the Island is located within the State of South Dakota, the state, by its appropriate agency, would claim title to the lands against the Movants." * * * "The intervenors' claims and defenses as to the major questions of law or fact, are in common with those asserted by the defendant." The case of *Rhode Island v. Massachusetts*, 37 U. S. 657, 9 Law. Ed. 1270 pointed out that *merely* because the people inhabiting the disputed area were not made parties did not make void the order of the court.

In *New Jersey v. New York*, 345 U. S. 369, 97 Law. Ed. 1081, the court said an intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens of the state which interest is not properly represented by the state. Here intervenors have met that burden as pointed out by the Special Master. The interests of South Dakota and intervenors are in direct conflict and are substantial. *United States of America v. Nevada, et al.*, 412 U. S. 534, 37 Law. Ed. 2d 132 does not seem to reach the question which is raised here.

In *Utah v. United States*, 394 U. S. 89, 22 Law. Ed. 2d 99 the court said a stipulation entered into between the United States and Utah so limited the issues before the court that the presence of Morton (the private individual) and similar property owners is neither necessary nor appropriate. Morton's motion was denied because of the circumstances set out in the stipulation. *But for the stipulation Morton's right to intervene would have had a substantial basis.*

The court further said it declined to permit intervention for the sole purpose of permitting a private party

to introduce new issues which have not been raised by the sovereign directly concerned. Here intervenors seek to introduce no new issues; but seek only to join the State of Nebraska in supporting the claim that Rush Island is and always has been a part of the State of Nebraska.

Plaintiff's claim that intervenors have no interest in the proceeding, that the outcome will not directly affect their title because it is derived from a federal patent. But unless Rush Island is in South Dakota (on the South Dakota side of the main channel of the Missouri River) plaintiff has no claim or interest to the island under SDCL 1967, 5-2-4, and the outcome of this case is, in consequence, of vital interest to intervenors and is diametrically opposed to the interests of South Dakota.

CONCLUSION

As was pointed out by the Special Master, the interest of South Dakota and the intervenors here is not the same, but in direct conflict. As this court pointed out in *Kentucky v. Indiana,* supra, an individual citizen may be made a party where relief is properly sought against him and in such case he should have suitable opportunity to show the nature of his interest. Plaintiff's exceptions to the Special Master's report should be overruled.

Dated at Vermillion, South Dakota, this 1st day of August, 1977.

Respectfully submitted,

EVERETT A. BOGUE,
Box 435,
Vermillion, South Dakota 57069

Attorney for Movants for Leave to Intervene

Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

NO. 72 Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant,

and

ROBERT J. FOLEY AND PHYLLIS K. FOLEY HIS WIFE AS JOINT TENANTS AND THEIR SURVIVOR, and OTTO ISAAK,

Intervenors.

MOTION FOR SUBSTITUTION FOR DECEASED PARTY INTERVENOR

EVERETT A. BOGUE

P. O. Box 435
Vermillion, South Dakota 57069

Attorney for Helen H. Issak, Executrix of the estate of Otto Isaak, deceased

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

In The

Supreme Court of the United States

—o—

NO. 72 Original

—o—

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant,

and

ROBERT J. FOLEY AND PHYLLIS K. FOLEY HIS WIFE AS JOINT TENANTS AND THEIR SURVIVOR, and OTTO ISAAK,

Intervenors.

—o—

MOTION FOR SUBSTITUTION FOR DECEASED PARTY INTERVENOR

—o—

Helen H. Isaak, as executrix of the estate of Otto Issak, deceased, moves the court for her substitution as an intervenor party in the above entitled action in place of the Intervenor, Otto Isaak, deceased.

The intervenor, Otto Isaak, died in and a resident of Bon Homme County, South Dakota, testate, on September 26, 1977 and Helen H. Isaak was appointed and qualified as executrix of his estate in the Circuit Court of Bon

Homme County, South Dakota, Tyndall, South Dakota, on October 25, 1977, and she is now the duly appointed, qualified and acting executrix of the estate of Otto Isaak deceased. A certified copy of her letters Testamentary has been filed with the Clerk of this ourt.

Dated at Vermillion, South Dakota December 9, 1977.

Respectfully submitted,

.....

EVERETT A. BOGUE

P. O. Box 435
Vermillion, South Dakota 57069

Attorney for Helen H. Isaak, Executrix of the estate of Otto Isaak, Deceased.

Office - Supreme Court, U.S.
FILED
MAR 8 1982
ALEXANDER L. STEVAS,
CLERK

1975 No. 72, Original

In the Supreme Court of the United States

October Term, 1975

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant,

and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor, and HELEN ISAAK, as Executrix of the Estate of OTTO ISAAK, Deceased,
Intervenors.

REPORT OF THE SPECIAL MASTER

OREN HARRIS
Senior District Judge
Special Master

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

REPORT OF THE SPECIAL MASTER 1-4

APPENDIX—

Judgment of Dismissal 5

Appendix A 9

Stipulation for Dismissal 11

Appendix A 14

Motion to Dismiss 16

Exhibit "A" Stipulation for Dismissal 18

Appendix A 21

1975 No. 72, Original

In the Supreme Court of the United States

October Term, 1975

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant,

and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor, and HELEN ISAAK, as Executrix of the Estate of OTTO ISAAK, Deceased,
Intervenors.

REPORT OF THE SPECIAL MASTER

In this delayed action, the Special Master makes his report in accordance with the Order entered by the Supreme Court of the United States December 6, 1976. The delay in submitting a report is due primarily to the undertaking of substantial discovery by all the parties to the action. Additionally, each of the three attempts by the Master to schedule a hearing on the merits was met with an attempt by the parties to reach a settlement on the issue as to the present and future boundary between the States of South Dakota and Nebraska.

All of the parties have now entered into a stipulation of agreed facts and procedures for settlement of present

and future disputes and for the dismissal of this action. The Special Master, therefore, makes this Report to the Court with recommendation. The Stipulation is attached hereto and made a part of this Report by reference.

With the permission of the Court, the plaintiff, State of South Dakota, filed its complaint 1975 No. 72, Original, on October 4, 1976. On October 29, 1976, the defendant, State of Nebraska, filed its answer.

On November 22, 1976, Robert J. Foley, Phyllis K. Foley, and Otto Isaak filed a Motion for Leave to Intervene as defendants. By Order of the Supreme Court, an intervention was permitted to be filed on June 20, 1977. By Order filed December 22, 1977, there was a substitution of Helen Isaak as Executrix for the Estate of Otto Isaak.

The Special Master, by Order entered June 23, 1978, permitted an Amendment to the Complaint in Intervention filed by Intervenors. The Amendment states a claim of interest relating to the property which is the subject of this No. 72, Original litigation.

The primary dispute between the States of South Dakota and Nebraska, and the Intervenors pertains to property known as *Rush Island*. The State of South Dakota claims this property is within its boundaries. Its claim of title to the property appears to involve the division of school and public lands under the Constitution and statutes of the State of South Dakota. The State of Nebraska claims this property is within its boundaries.

In the Amended Complaint in Intervention, the Intervenors state the boundary between Cedar County, Nebraska and Yankton County, South Dakota was established as the middle of the channel of the Missouri River. They cite 13 U.S. Stat. at Large 47 (Passed April 19, 1864) as support for their contention. Intervenors claim the

described real estate in which they contend an interest is within the boundary and borders of the State of Nebraska.

The parties have had substantial discovery. They have benefited from depositions, interrogatories, the various pleadings, exhibits, and obviously, discussions among themselves. A Stipulation for Dismissal of the action was filed with the Master on September 24, 1981.

Also on September 24, 1981, a motion was filed with the Master to dismiss the action. This was based on stipulation signed by all the parties and an agreement of settlement terminating the dispute through agreement and compromise. The parties agreed to submit any future boundary disputes between the State of South Dakota and the State of Nebraska with respect to the particular lands involved (namely Rush Island) to a Joint State Boundary Commission.

The parties had submitted proposals for the purpose of an agreed judgment, but objections were noted on each proposal. Upon receipt of a Motion to Dismiss, together with Stipulation for Dismissal, the Master prepared and submitted a Proposed Judgment of Dismissal to all parties. This Judgment of Dismissal is satisfactory to and has been signed by all parties to this action.

Pursuant to Rule 9 of the Supreme Court Rules and Rule 53 of the Federal Rules of Civil Procedure, the Special Master submits a Judgment of Dismissal, which is based on the Stipulation for Dismissal and the Motion to Dismiss referred to herein.

Paragraph 5 of the Judgment of Dismissal provides: "That the Bill of Complaint filed by the State of South Dakota against the State of Nebraska initiating this action be and the same is hereby dismissed without prejudice, each party bearing its own costs."

The Special Master appointed by this Court recommends to the Court that this Report be accepted and this action be dismissed as agreed to by all parties.

Submitted this 22nd day of February, 1982.

OREN HARRIS
Special Master

APPENDIX

(Received and entered file, Feb. 4, 1982.
Oren Harris, Master)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,

v.

STATE OF NEBRASKA,
Defendant,

AND

ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor and HELEN ISAAK as executrix of the estate of OTTO ISAAK, Deceased,
Intervenors.

JUDGMENT OF DISMISSAL

This matter comes on before this Court by the Joint Motion to Dismiss and Stipulation for Dismissal by each of the parties hereto: the State of South Dakota, by and through its Attorney General, Mark Meierhenry; the State of Nebraska, by and through its Attorney General, Paul L. Douglas; the Intervenors, by and through themselves and their attorney, Everett A. Bogue; requesting the Court to dismiss the action based upon the agreements in the Stipulation of Dismissal.

IT IS THE FINDING OF THIS COURT THAT:

1. The parties have concluded that it is in the best interests of each of them to avoid litigation and multiple exercises of sovereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said parties with respect to the location of the boundary between the states, and therefore, to settle and to terminate this dispute by agreement and compromise to the end of securing dismissal of this action, and submission of the boundary between the State of South Dakota and the State of Nebraska with respect to Rush Island in the future to a Joint State Boundary Commission.

2. In the furtherance of the best interests of each of the parties it is recognized that the land known as "Elk/Rush Island" subject of this lawsuit, is now, and has been, within the boundary of the State of Nebraska and subject to its jurisdiction.

3. The bill of complaint filed by the State of South Dakota in May 1976, initiating this action, should be dismissed without prejudice, each party bearing its own costs.

4. The State of South Dakota has agreed to cede to the Intervenors any right or title it may have in the subject property known as "Elk/Rush Island", more fully described in Appendix A attached to the Stipulation of Dismissal; and the State of South Dakota specifically recognizes the Judgment of the District Court of Cedar County, Nebraska, dated November 7, 1958, which quieted title to the above identified land in Clyde Gill and others, predecessors of the Intervenors, which action can be found in the records of Cedar County District Court of Nebraska, Case No. 5628, Docket 24, Page 13.

5. The State of South Dakota has further agreed to dismiss an action to quiet title filed in the Circuit Court of Yankton, South Dakota, regarding this subject property.

6. The States of Nebraska and South Dakota have agreed to submit the determination of the future boundary changes with regard to "Elk/Rush Island" but not to the title to the premises therein, to a Joint State Boundary Commission appointed by the elected officials of these respective states for the Commission's determination forth.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that pursuant to the above Stipulations and Findings:

(1) That the land known as "Elk/Rush Island" the subject of this litigation be and the same is within the boundary of the State of Nebraska and subject to its jurisdiction;

(2) That the State of South Dakota hereby cedes to the Intervenors any right or title it may have in the subject property known as "Elk/Rush Island" as more fully described in Appendix A, attached hereto;

(3) That the States of Nebraska and South Dakota will submit the determination of the future boundary changes, if any, with regard to "Elk/Rush Island" but not to the title to the premises thereto, to a Joint State Boundary Commission appointed by the elected officials of these respective states for the Commission's determination from the date of that determination forth;

(4) That the State of South Dakota and the State of Nebraska will proceed to effectuate any and all other requirements agreed to in the Stipulation to the extent that conditions and circumstances permit; and

(5) That the Bill of Complaint filed by the State of South Dakota against the State of Nebraska initiating this action be and the same is, hereby, dismissed without prejudice, each party bearing its own costs.

DATED this 22nd day of February, 1982.

/s/ Oren Harris
Master

THE STATE OF SOUTH DAKOTA, Plaintiff,

By /s/ Mark Meierhenry
Mark Meierhenry
Attorney General

THE STATE OF NEBRASKA, Defendant

By /s/ Paul L. Douglas
Paul L. Douglas
Attorney General

ROBERT J. FOLEY, Intervenor,

By /s/ Robert J. Foley

PHYLLIS K. FOLEY, Intervenor,

By /s/ Phyllis K. Foley

HELEN ISAAK, as executrix of the
Estate of OTTO ISAAK,

By /s/ Helen Isaak

By /s/ Everett A. Bogue
Everett A. Bogue
Attorney for Intervenors

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,

-vs-

STATE OF NEBRASKA,
Defendant,

and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, his wife as joint tenants and their survivor, and Helen H. Isaak as executrix of the estate of Otto Isaak, deceased,
Intervenors.

APPENDIX A

Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1, East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, Page 70 as follows: Commencing at the Section corner of Sections 7 and 8, in Township 33, Range 1, East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning, thence running 710 feet north 81 degrees east, thence 805 feet north, 68 degrees east, thence 942 feet

north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 5 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, and that intervenors are the record owners thereof.

GRA/cmb/w12

(Filed September 24, 1981. Judge Oren Harris, Master)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,
v.
STATE OF NEBRASKA,
Defendant,
and
ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor and HELEN ISAAK as executrix of the estate of OTTO ISAAK, Deceased,
Intervenors.

STIPULATION FOR DISMISSAL

COMES NOW the parties, the State of South Dakota, the Plaintiff by and through its Attorney General, Mark V. Meierhenry; the State of Nebraska, Defendant, by and through its Attorney General, Paul L. Douglas; and the Intervenors by and through themselves personally and their Attorney, Everett A. Bogue, and hereby stipulate and agree:

1. It is in the best interests of each of the parties hereto to avoid litigation and multiple exercises of sovereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said parties with respect

to the location of the boundary between the states, and therefore, to settle and to terminate this dispute by agreement and compromise to the end of securing dismissal of this action, and submission of the boundary between the State of South Dakota and the State of Nebraska with respect to this particular land (Rush Island) in the future to a Joint State Boundary Commission.

2. In furtherance of the best interests of all parties it is recognized that the land known as "Elk/Rush Island" subject of this lawsuit is now, and has been, within the boundary of the State of Nebraska and subject to its jurisdiction.

3. The bill of complaint filed by the State of South Dakota in May, 1976, initiating this action, should be dismissed without prejudice, each party bearing its own costs.

4. The State of South Dakota hereby cedes to the intervenors any right or title it may have in the subject property known as Elk/Rush Island, more fully described in Appendix A attached hereto and made a part hereof; and the State of South Dakota specifically recognizes the Judgment of the District Court of Cedar County, Nebraska dated November 7, 1958, which quieted title to the above identified land in Clyde Gill and others, predecessors of the intervenors, which action can be found in the records of the Cedar County District Court of Nebraska. (Case #5628, Docket #24, page 13.)

5. The State of South Dakota hereby agrees to dismiss an action to quiet title filed in the Circuit Court of Yankton, South Dakota regarding this subject property.

6. The State of Nebraska and the State of South Dakota will submit the determination of the future bound-

ary changes with regard to Elk/Rush Island, but not to the title to the premises therein, to a joint State Boundary Commission appointed by the elected officials of these respective states for the Commission's determination from the date of that determination forth.

Dated this 18 day of August, 1981.

THE STATE OF SOUTH DAKOTA,
Plaintiff

By: /s/ Mark V. Meierhenry
Mark V. Meierhenry
Attorney General

THE STATE OF NEBRASKA,
Defendant

By: /s/ Paul L. Douglas
Paul L. Douglas
Attorney General

ROBERT J. FOLEY, Intervenor

By: /s/ Robert J. Foley

PHYLLIS K. FOLEY, Intervenor

By: /s/ Phyllis K. Foley

HELEN ISAAK, as executrix of
the estate of OTTO ISAAK

By: /s/ Helen Isaak

By: /s/ Everett A. Bogue
Everett A. Bogue
Attorney for Intervenors

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

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Plaintiff,

-vs-

STATE OF NEBRASKA,
Defendant,

and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, his wife as joint tenants and their survivor, and Helen H. Isaak as executrix of the estate of Otto Isaak, deceased,
Intervenors.

APPENDIX A

Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1, East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, Page 70 as follows: Commencing at the Section corner of Sections 7 and 8, in Township 33, Range 1, East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning, thence running 710 feet north 81 degrees east, thence 805 feet north, 68 degrees

east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, and that intervenors are the record owners thereof.

GRA/cmb/w12

(Filed September 24, 1981. Judge Oren Harris, Master)

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October Term, 1975

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STATE OF SOUTH DAKOTA,
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STATE OF NEBRASKA,
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and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor and HELEN ISAAK as executrix of the estate of OTTO ISAAK, Deceased,
Intervenors.

MOTION TO DISMISS

COME NOW the parties, the State of South Dakota, the plaintiff by and through its Attorney General, Mark Meierhenry; the State of Nebraska, defendant, by and through its Attorney General, Paul L. Douglas; the intervenors by and through their attorney, Everett A. Bogue, and hereby move the Court to dismiss the action for the reason that a stipulation and agreement of settlement has been reached terminating this dispute between the parties,

such stipulation of settlement being attached hereto, marked Exhibit A and by this reference made a part hereof.

PHYLLIS K. FOLEY, Intervenor

By /s/ Phyllis K. Foley

HELEN ISAAK, as executrix of the estate of OTTO ISAAK

By /s/ Helen Isaak

By /s/ Everett A. Bogue
Everett A. Bogue
Attorney for Intervenors.

THE STATE OF SOUTH DAKOTA, Plaintiff

By /s/ Mark Meierhenry
Mark Meierhenry
Attorney General

THE STATE OF NEBRASKA, Defendant

By /s/ Paul L. Douglas
Paul L. Douglas
Attorney General

ROBERT J. FOLEY, Intervenor

By /s/ Robert J. Foley

EXHIBIT "A"

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
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STATE OF NEBRASKA,
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and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor and HELEN ISAAK as executrix of the estate of OTTO ISAAK, Deceased,
Intervenors.

STIPULATION FOR DISMISSAL

COMES NOW the parties, the State of South Dakota, the Plaintiff by and through its Attorney General, Mark V. Meierhenry; the State of Nebraska, Defendant, by and through its Attorney General, Paul L. Douglas; and the Intervenors by and through themselves personally and their Attorney, Everett A. Bogue, and hereby stipulate and agree:

1. It is in the best interests of each of the parties hereto to avoid litigation and multiple exercises of sov-

ereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said parties with respect to the location of the boundary between the states, and therefore, to settle and to terminate this dispute by agreement and compromise to the end of securing dismissal of this action, and submission of the boundary between the State of South Dakota and the State of Nebraska with respect to this particular land (Rush Island) in the future to a Joint State Boundary Commission.

2. In furtherance of the best interests of all parties it is recognized that the land known as "Elk/Rush Island" subject of this lawsuit is now, and has been, within the boundary of the State of Nebraska and subject to its jurisdiction.

3. The bill of complaint filed by the State of South Dakota in May, 1976, initiating this action, should be dismissed without prejudice, each party bearing its own costs.

4. The State of South Dakota hereby cedes to the intervenors any right or title it may have in the subject property known as Elk/Rush Island, more fully described in Appendix A attached hereto and made a part hereof; and the State of South Dakota specifically recognizes the Judgment of the District Court of Cedar County, Nebraska dated November 7, 1958, which quieted title to the above identified land in Clyde Gill and others, predecessors of the intervenors, which action can be found in the records of the Cedar County District Court of Nebraska. (Case #5628, Docket #24, page 13.)

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Dated this 18 day of August, 1981.

THE STATE OF SOUTH DAKOTA,
Plaintiff

By: /s/ Mark V. Meierhenry
Mark V. Meierhenry
Attorney General

THE STATE OF NEBRASKA
Defendant

By: /s/ Paul L. Douglas
Paul L. Douglas
Attorney General

ROBERT J. FOLEY, Intervenor

By: /s/ Robert J. Foley

PHYLLIS K. FOLEY, Intervenor

By: /s/ Phyllis K. Foley

HELEN ISAAK, as executrix of the estate of OTTO ISAAK

By: /s/ Helen Isaak

By: /s/ Everett A. Bogue
Everett A. Bogue
Attorney for Intervenors

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